Jurisdictional Statement

81-229

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRITO-LAY, INC.,

Appellant,

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and JAMES R. LYONS,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the Wisconsin handicap discrimination statute invalid as applied to Frito-Lay[1] because all of Frito-Lay's shipments from its Beloit, Wisconsin trucking terminal are in interstate commerce and the application of the Wisconsin statute conflicts with federal regulations, adopted pursuant to Part II of the Interstate Commerce Act, that prescribe minimum physical qualifications for truck drivers engaged in interstate commerce?

2. Even if some of Frito-Lay's shipments from the Beloit terminal were not in interstate commerce, does the application of the Wisconsin handicap discrimination statute to require Frito-Lay to restructure its delivery system to eliminate any commingling of clearly interstate deliveries and intrastate deliveries impose an undue burden on interstate commerce, in violation of Art. I, §8, cl. 3 of the Constitution?

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[1]Appellant, Frito-Lay, Inc., is a wholy owned subsidiary of PepsiCo, Inc.

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President's Committee on the Employment of the

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FRITO-LAY, INC.,

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WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and JAMES R. LYONS,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin was entered on March 31, 1981. A timely motion for reconsideration was denied on May 4, 1981. The text of the opinion and of the order on the motion for reconsideration issued by that court, together with the opinions of the Wisconsin Court of Appeals, the Wisconsin Circuit Court of Appeals for Dane County and the Wisconsin Labor and Industry Review Commission are in the Appendix. The opinion of the Supreme Court of Wisconsin is reported at 101 Wis. 2d 169, 303 N.W.2d 668 (1981), and the opinion of the Wisconsin Court of Appeals is reported at 95 Wis. 2d 395, 290 N.W.2d 551 (1980).

JURISDICTION

This appeal raises a question about the validity of the Wisconsin Fair Employment Practices Act, Wis. Stat. §111.32(5)(f) (1977), as applied to Frito-Lay, Inc. in light of the Commerce Clause of the Constitution, Art. I, §8, cl. 3; provisions of Part II of the Interstate Commerce Act, formerly known as the Motor Carrier Act, 49 U.S.C. §§302(a) and 304; and regulations promulgated by the Department of Transportation that prescribe minimum physical qualifications for drivers engaged in interstate commerce, 49 C.F.R. §390.1 *et seq.* (1980).

This important federal question was timely raised by Frito-Lay, Inc. throughout the proceedings before the Wisconsin administrative agency and courts. On March 31, 1981, the Supreme Court of Wisconsin, acting through an equally divided panel, affirmed without opinion the decision

of the Court of Appeals of Wisconsin issued on February 18, 1980. The Court of Appeals had reversed the ruling of the Circuit Court of Appeals for Dane County, holding instead that Frito-Lay was liable to the complaining individual party, James Lyons, because it had refused to continue his employment as a truck driver once the company was advised that his eyesight did not meet the standards for visual acuity imposed by the regulations of the Department of Transportation for interstate drivers, 49 C.F.R. §391.41(b)(10) (1980). The Wisconsin Court of Appeals upheld the validity of the Wisconsin statute as applied to Frito-Lay on the basis of that court's conclusion that Frito-Lay could have restructed its routes and then assigned Mr. Lyons to drive routes within the state of Wisconsin that the Wisconsin court concluded were not a part of interstate commerce. Frito-Lay filed a timely motion for reconsideration in the Supreme Court of Wisconsin, which was denied on May 4, 1981. A notice of appeal to this Court was filed on July 22, 1981.

This Court has jurisdiction to review the decision of the Wisconsin Supreme Court on appeal pursuant to 28 U.S.C. §1257(2) (1976). The following decisions of this Court confirm that there is jurisdiction over this appeal as a matter of right under that statute: *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979); *Cohen v. California,* 403 U.S. 15 (1971); *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965); *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution, Art. I, §8, cl. 3. (Appendix, A32.)

2. Part II of the Interstate Commerce Act, formerly known as the Motor Carrier Act, 49 U.S.C. §§302(a), 303(a)(10) and 304(a)(3) (1976). (Appendix, A32.)

3. 49 C.F.R. §§390.32, 391.41(b)(10), 392.2 (1980). (Appendix, A33.)

4. Wis. Stat. §§111.32(5)(a) and 111.32(5)(f) (1977). (Appendix A33, A34.)

STATEMENT OF THE CASE

Frito-Lay, Inc. is a nationally recognized manufacturer of snack foods. It maintains its corporate headquarters in Dallas, Texas and operates manufacturing plants in a variety of states, including Wisconsin. James Lyons was employed by Frito-Lay as a truck driver at its manufacturing plant and shipping terminal located in Beloit, Wisconsin.

Approximately forty truck drivers worked out of the Beloit plant, delivering Frito-Lay products to retailers in Wisconsin, Minnesota, Michigan, Iowa and Illinois. Because the Beloit plant itself did not manufacture a complete line of Frito-Lay products, products that were manufactured in other states were shipped into the Beloit plant and then placed on delivery trucks, along with Frito-Lay products manufactured at Beloit, for delivery to retailers in the five-state area. Any out-of-state manufactured products were usually unloaded and reloaded onto trucks at the Beloit plant that would contain both products manufactured at the Beloit

plant and the out-of-state products for delivery to grocery stores and other customers. Generally, products manufactured at Frito-Lay facilities outside of Wisconsin were reshipped to retailers within the five-state area serviced by the Beloit plant within three days of their arrival at the Beloit shipping terminal. These products were not repackaged or processed in any manner at the Beloit plant. In some cases the out-of-state shipments were not even unloaded but were driven by Beloit drivers directly to retailers. Approximately 38% of the products manufactured at the Beloit plant were ultimately delivered to retailers in Wisconsin, while the remaining 62% of these products were delivered to out-of-state destinations by Frito-Lay drivers operating out of the Beloit terminal. In virtually all cases, the shipments from the Beloit terminal to retailers included both Beloit-manufactured and out-of-state manufactured products, whether the delivery destination was within Wisconsin or into one of the other states serviced from the Beloit terminal.

For approximately five years, Mr. Lyons had worked for Frito-Lay as a driver at the Beloit terminal, making deliveries in the five-state area. In the fall of 1975, Frito-Lay became aware that Mr. Lyons suffered from an incurable condition of amblyopia in his left eye, which left him with visual acuity in that eye of 20/200 (Snellen), although his right eye had visual acuity of 20/20. Thus, Mr. Lyons could not comply with Department of Transportation regulations that require that drivers engaged in interstate commerce have visual acuity in both eyes of at least 20/40. *See* 49 C.F.R. §391.41(b)(10) (1980). Frito-Lay placed Mr. Lyons on a lay-off status, pending a response by the Department of Transportation to Frito-Lay's request that it waive this requirement. When this request was denied, Frito-Lay advised Mr. Lyons that he could not be reinstated

because he did not satisfy the visual acuity requirements imposed by the Department of Transportation regulations.

While Mr. Lyons worked for Frito-Lay, truck drivers periodically bid for route assignments, or "runs," on the basis of their seniority. Whenever a driver successfully bid for a particular run, he would then drive that route for a period of six months. When Frito-Lay first discovered Mr. Lyons' vision problems, he was assigned to a run that required him to make deliveries not only within Wisconsin, but also to other states. After the Department of Transportation refused to waive the requirement that Mr. Lyons comply with the visual acuity standards under its regulations, Mr. Lyons requested the company to assign him to another run, with the consent of the driver who had originally bid for that run and who was willing to take Mr. Lyons' run in his place. However, that run also required the driver to make some out-of-state deliveries. Mr. Lyons then requested that he be allowed to make this run but with the deletion of the required out-of-state deliveries. Mr. Lyons believed that he would no longer be subject to the Department of Transportation's requirements if he did not make any out-of-state deliveries. Frito-Lay refused this request, whereupon Mr. Lyons filed a complaint against Frito-Lay in the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, alleging that Frito-Lay had discriminated against him because of a handicap, in violation of the Wisconsin Fair Employment Practices Act, Wis. Stat. § § 111.31-37 (1977).

Under the procedures for processing employment discrimination complaints established by the Wisconsin Fair Employment Practices Act, a hearing examiner received evidence and then rendered a proposed decision. This proposed decision concluded that Frito-Lay would have

been able to restructure its runs to create a run consisting solely of deliveries within the state of Wisconsin; and that, because Mr. Lyons' eyesight met Wisconsin's standards for visual acuity, which were less stringent than the federal standards, Frito-Lay had discriminated against Mr. Lyons because of a handicap by failing to create this special run for Mr. Lyons. The hearing examiner recommended reinstatement for Mr. Lyons with back pay, seniority rights and other benefits. On October 14, 1977, the Labor and Industry Review Commission of Wisconsin adopted this proposed decision in all respects. (See Appendix, A22-A28.)

Frito-Lay appealed this decision to the Circuit Court of Dane County. In a memorandum decision dated December 14, 1978, that court concluded that the federal regulations applied to all of Frito-Lay's drivers at the Beloit terminal because those drivers were engaged in interstate commerce. (Appendix, A15-A20.) The judge rejected the implicit conclusion of the Commission that routes that originated at the Beloit terminal and terminated within Wisconsin constituted only intrastate commerce so that the less stringent Wisconsin vision standards could be applied. The court concluded:

> Considering that a portion of the goods shipped by Beloit truckers originate out of state, and that approximately two-thirds of the shipped goods are destined for out of state use, it seems to me the wiser view that Frito-Lay and the truckers employed at the Beloit plant are engaged in interstate commerce and that federal standards must be met by each driver. Even if Frito-Lay created a "run" for Lyons that did not take him outside Wisconsin, he would be delivering goods that are in the stream of interstate commerce.

Mem. Dec. at 5 (Cir. Ct. Wisc. 1978) (Appendix, A19.) By order dated January 9, 1979, the Circuit Court implemented

its decision by vacating and setting aside the decision of the Wisconsin Labor and Industry Review Commission. (Appendix, A20-A21.)

Following this decision, the Wisconsin Labor and Industry Review Commission and Mr. Lyons appealed to the Wisconsin Court of Appeals. That court reversed, holding that a motor carrier that operates truck routes, some of which are purely within the boundaries of the state and some of which cross state lines, is not thereby engaged in interstate commerce. (Appendix, A3-A14.) Rather, the court concluded that because it would be possible for Frito-Lay to create a run that involved only deliveries within Wisconsin, Frito-Lay could thereby escape being involved in interstate commerce so that it could continue to employ Mr. Lyons. Because Frito-Lay did not create such a run for Mr. Lyons, the company was deemed to have violated the Wisconsin statute. The court explicitly rejected Frito-Lay's contention that the federal regulations would apply to Mr. Lyons when he made deliveries that were purely within the state of Wisconsin because the products that would be moved in those deliveries were products that, to a substantial extent, had moved in interstate commerce and were merely being reshipped from the Beloit terminal to destinations in that state as part of the flow of interstate commerce.

The judgment of the Court of Appeals of Wisconsin was rendered February 18, 1980. Frito-Lay then appealed to the Supreme Court of Wisconsin. Because the Wisconsin Supreme Court was equally divided, it rendered no written opinion on the issues raised by Frito-Lay's appeal but affirmed the Court of Appeals' decision on March 31, 1981. (Appendix, A1.) Frito-Lay filed a timely motion asking the Wisconsin Supreme Court to reconsider this decision,

but that motion was denied on May 4, 1981. (Appendix, A2.)

Frito-Lay at all times has maintained that its truck drivers were subject to the federal regulations setting minimum physical standards because its drivers were engaged in interstate commerce, even if it were possible for some of the drivers to make deliveries from the Beloit terminal only to destinations within the state of Wisconsin. For example, in its "Post-hearing Brief and Proposed Findings of Fact and Conclusions of Law," which Frito-Lay submitted to the hearing examiner from the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations, Frito-Lay framed the issue as follows:

> In the instant case, if the Wisconsin Fair Employment Practices Act is interpreted to require that Complainant (Mr. Lyons) be allowed to drive on Respondent's trips which contain goods in interstate commerce, albeit wholly within the state of Wisconsin, then the Wisconsin Fair Employment Practices Act would be in conflict with the Federal Motor Carrier Act, and consequently must give way to the federal law.

(Appendix, A36.)

Similarly, in each of the briefs issued by Frito-Lay in the Wisconsin Court of Appeals (see Appendix, A36-A42) and in the Wisconsin Supreme Court (see Appendix, A42-A46), Frito-Lay continued to argue that, if the Wisconsin statute were applied to it on its delivery routes that were located solely within the state of Wisconsin, then the Wisconsin statute would be in conflict with the federal regulations, for even those routes were still "interstate commerce" within the meaning of the federal laws.

Because the highest court of the state of Wisconsin upheld the validity of the Wisconsin statute despite Frito-Lay's claim that the law was invalid as applied, Frito-Lay is

entitled to an appeal of right to this Court under 28 U.S.C. §1257(2) (1976). Where a state court construes federal law in such a manner as to render the federal law inapplicable and thereby sustains the application of a state law that otherwise conflicts with federal law, this Court has consistently held that there is an appeal of right available under 28 U.S.C. §1257(2) (1976) and its predecessor. *See, e.g., Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979); *Cohen v. California,* 403 U.S. 15 (1971); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921).

Even if the Wisconsin courts correctly decided that deliveries within Wisconsin from the Beloit terminal were only intrastate commerce, the Wisconsin statute is invalid as applied because it imposes an undue burden on interstate commerce. The opinion of the Wisconsin Court of Appeals recognized that the majority of Frito-Lay's deliveries from the Beloit terminal crossed state lines and were clearly in interstate commerce. (Appendix, A13.) Because runs were assigned on the basis of seniority pursuant to a bidding system, there was no guaranty of which driver might be assigned to a given run. Many runs, including Mr. Lyons' run and the run to which he first wished to be reassigned, commingled delivery routes inside Wisconsin and clearly interstate delivery points outside Wisconsin. The Wisconsin courts have now required Frito-Lay, an interstate business, to restructure its operations to eliminate any commingling of its interstate and, *arguendo,* intrastate shipments so that the Wisconsin statute may then be applied to require Frito-Lay to designate these "intrastate" runs for a driver like Mr. Lyons, who does not meet federal standards. Such an application of the Wisconsin law places an undue burden on interstate commerce and is invalid in light of Art. I, §8, cl. 3 of the Constitution.

Because the Wisconsin Supreme Court and the Wisconsin Court of Appeals erred in their decisions upholding the validity of the Wisconsin handicap discrimination statute as applied to Frito-Lay, despite Frito-Lay's obligations under federal law to insist upon employing drivers who met federal standards for persons driving trucks in interstate commerce, Frito-Lay has now filed a timely notice of appeal to this Court, following the denial of Frito-Lay's motion for reconsideration by the Wisconsin Supreme Court.

SUBSTANTIALITY OF THE FEDERAL QUESTIONS

Part II of the Interstate Commerce Act, also known as the Motor Carrier Act, expresses important public policies. Congress has summarized these policies in the following declaration of purpose, known as the "National Transportation Policy":

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act. . ., so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act. . ., shall be administered and enforced with a view to carrying out the above declaration of policy.

Act of Sept. 18, 1940, ch. 722, tit. I, §1, 54 Stat. 899, 49 U.S.C., note preceding §301 (1976). Thus, the question of whether a particular activity of one who engages in the interstate transportation of goods is subject to regulations promulgated under the Motor Carrier Act touches upon an important public interest, for Congress has clearly declared its desire to have a national transportation policy that, among other things, seeks to promote safety in transportation. As the court of appeals recognized in *Commercial Standard Insurance Co. v. Robertson,* 159 F.2d 405 (6th Cir. 1947);

> By [the Motor Carrier Act] the Congress fashioned a general scheme of regulation for control of all motor carriers engaged in interstate commerce, whether public or private carriers. In respect to public carriers its purpose was not merely to authorize operations necessary and convenient to the public and to control rates and charges, but to insure the safety of their operations in the public interest.... In pursuance of that policy the Motor Carrier Act, Title 49 U.S.C.A. §304(a) (1), provides that the Interstate Commerce Commission may establish reasonable regulations governing "qualifications and maximum hours of service of employees, and safety of operation and equipment." It was given like powers in respect to contract carriers.

Id. at 409.

This Court has recognized the strong public interest in the safety program adopted by the regulations promulgated pursuant to the Motor Carrier Act and has found strong justification in this interest for the rule making powers of the agency designated to carry out this important public

purpose. Thus, this Court concluded in *Levinson v. Spector Motor Service,* 330 U.S. 649 (1947), that:

> It is essential to the Commission's safety program whenever and wherever hazardous activities are engaged in that affect the safety of operation of an interstate motor carrier, that those who engage in them shall be qualified to do so and that maximum hours of service affecting such safety of operation shall be established and enforced.
>
> * * *
>
> From the point of view of the safety program under the Motor Carrier Act, there is no need for a sharply drawn limit to the power of the Commission to make regulations with respect to employees whose activities affect safety of operation of motor vehicles in interstate or foreign commerce.

Id. at 668, 671. *See also Starrett v. Bruce,* 391 F.2d 320 (10th Cir.), *cert. denied,* 393 U.S. 971 (1968).

There is no question that the kind of regulation with respect to visual acuity involved in this litigation is one calculated to address the issue of safety among those who engage in the interstate transportation of goods. The state of Wisconsin has a different view of what level of vision is needed to assure that a driver is able to see adequately. Yet, under the Supremacy Clause and the express language of the regulations, *see* 49 C.F.R. §392.2 (1980), less stringent state standards must yield to the demands of safety for those who engage in interstate commerce that are reflected in current regulations.

However, the Wisconsin Supreme Court, by affirming the decision of that state's Court of Appeals, has upheld the application of Wisconsin's less stringent standards in the face of Frito-Lay's argument that it was obliged to comply with the federal regulations. The Wisconsin courts pur-

ported to avoid a direct clash between the Wisconsin handicap discrimination statute as applied to Frito-Lay and the clear command of the federal regulations, statutes and the Commerce Clause itself, by concluding that the delivery routes from the Beloit, Wisconsin truck terminal to other destinations within that state were purely intrastate commerce, not interstate commerce within the meaning of 49 U.S.C. §303(a) (10) (1976). By means of this ruling, the Wisconsin courts proceeded to apply the Wisconsin handicap statute, despite the clear conflict between physical qualifications standards that would be permissible under Wisconsin law and physical qualifications standards that are mandated under federal law.

This Court has concluded on a number of occasions that similar efforts by the highest courts of a state to escape the fact that their opinions have upheld the validity of a state law as applied in a situation where it is claimed that the state law conflicts with federal statutes or regulations bottomed on the Commerce Clause or other constitutional provisions should not be permitted. Instead, these cases are clearly within the category of actions for which an appeal of right is available under 28 U.S.C. §1257(2) (1976).

Indeed, one of the first cases in which this Court considered the reach of the predecessor of 28 U.S.C. §1257(2) involved an attack on a state statute as applied, where the state court had concluded that there was no interstate commerce involved and therefore there could be no conflict with federal law. However, in *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921), this Court concluded that there was an appeal of right available because the appellant had clearly claimed that the state's statute would be unenforceable in view of its conflict with federal law, although the state court had held that federal law

did not apply because of its conclusion that the transaction between the parties was not in interstate commerce. Later opinions of this Court have followed the *Dahnke-Walker* precedent.

For example, in *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653 (1948), Justice Frankfurter quickly rejected any challenge to the jurisdiction of this Court under 28 U.S.C. §1257(2) in a case in which the New York state courts had upheld a constitutional challenge to a state tax law, based upon the state court's conclusion that interstate commerce had not been involved. In *Cohen v. California,* 403 U.S. 15 (1971), Justice Harlan cited *Dahnke-Walker* again to support appellate jurisdiction under 28 U.S.C. §1257(2) in a case involving a challenge to the constitutionality of a California misdemeanor law. The California court had construed the statute in such a way as to eliminate a possible first amendment problem on the facts of the case, and the California Supreme Court, by divided vote, had declined to review the intermediate decision of that state's court of appeals. The appellant in that case had consistently challenged the California statute as applied in his case, rather than claiming that the statute was overly broad on its face. Justice Harlan concluded that this kind of attack on a statute as applied fell within the appeal of right provision.

In a case of otherwise rather limited significance, this Court once again found a sufficient basis for jurisdiction under 28 U.S.C. §1257(2), when it concluded that Congress had intended to exercise fully its power to regulate trade with the Indians under Art. I, §8, cl. 3 of the Constitution and, therefore, refused to permit an Arizona tax to be extended to a trading company that did retail business with Indians on an Arizona reservation. *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965).

More recently, and in the specific context of a question about the Commerce Clause, this Court again affirmed the availability of an appeal of right under 28 U.S.C. § 1257(2) (1976), where a state court had attempted to avoid finding a conflict between state and federal law through its construction of the federal statute. Thus, in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), this Court accepted jurisdiction in a case in which the state court had upheld the state's statute as applied despite the appellants' contention that this application was invalid on federal grounds. In that case, Japanese shipping companies had been subjected to a California ad valorem tax on cargo containers situated in California. Ultimately, this Court concluded on the merits that the California tax was unconstitutional because it constituted multiple taxation of instrumentalities of foreign commerce. The shipping companies had paid this tax under protest and then sued for a refund. The California Supreme Court interpreted federal law in such a manner as to conclude that the state tax was proper under the Commerce Clause and therefore upheld the tax as applied. In challenging the jurisdiction of this Court to take the matter under 28 U.S.C. § 1257(2), the taxing authorities argued that California had merely refused to extend to the shipping companies a federal immunity from taxation; hence, review might be had only by writ of certiorari. Instead, this Court concluded that there had been a square challenge to the constitutionality of the California ad valorem tax as applied to the foreign shipping companies and that, despite such a challenge, the California courts had upheld the validity of that law. Writing for the majority, Justice Blackmun concluded:

> We have held consistently that a state statute is sustained within the meaning of § 1257(2) when a state

> court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.

Id. at 441.

Appellant respectfully submits that precisely the same circumstances exist in this case, so that review and plenary consideration of the issues is warranted under 28 U.S.C. §1257(2) (1976). The Wisconsin Court of Appeals, whose opinion was affirmed by the divided vote of the Wisconsin Supreme Court, upheld the validity of applying the Wisconsin statute to Frito-Lay in the face of Frito-Lay's contention that even shipping routes that originated at the Beloit, Wisconsin terminal without crossing state lines were still in "interstate commerce." Frito-Lay argued from the outset that the Wisconsin handicap discrimination statute would be invalid if it were applied to force Frito-Lay to ignore the federal regulations, which carry with them criminal penalties, 49 U.S.C. §322(a) (1976), and to employ Mr. Lyons on any of its runs despite his inability to satisfy the physical requirements duly promulgated by the Department of Transportation to enforce the important safety policies expressed in the Motor Carrier Act. Under these circumstances, and in view of this Court's prior decisions, there is an important federal policy at issue, and the jurisdiction of this Court under 28 U.S.C. §1257(2) has properly been invoked.

In addition to the important public purpose of making certain that the federal interest in maximizing the safety of those who engage in interstate commerce on the public highways is protected, there is also an important federal purpose in assuring uniformity in the construction of the provisions of the Motor Carrier Act, and in particular, the safety regulations promulgated to enforce that act. If this

Court declined to review the decision of the Wisconsin Supreme Court, it seems doubtful that it would be able to review any other decision of a state court that applied similar laws prohibiting discrimination against the handicapped to force an employer to act inconsistently with federal regulations or statutes affecting physical qualifications for employees to which the employer believes itself subject. This risk of inconsistent interpretation and application of these important safety regulations is a very substantial one. At present, 46 states have enacted some form of legislation prohibiting discrimination against persons on the basis of a handicap. *See* President's Committee on the Employment of the Handicapped, *The Law and Disabled People* 68-80 (1980). The language of these statutes differs considerably, and each requires the interpretation of the courts of that state for proper enforcement. Each state court thus may have similar occasions to consider an employer's argument that the state law must yield to federal statutes or regulations. Frito-Lay itself faces this substantial risk of inconsistent adjudications about whether its drivers operating out of other terminals that, like the Beloit terminal, service several states are in fact engaged in interstate commerce.

These kinds of *ad hoc* and inconsistent determinations by the various states about whether Frito-Lay and other businesses are engaged in interstate commerce unduly burden interstate businesses in the daily conduct of their operations. It is because Frito-Lay attempted to comply with federal regulations that it has found itself in violation of a Wisconsin statute. Frito-Lay clearly desired to retain Mr. Lyons in its employment and even sought a waiver of the federal requirement that precluded his continued employment as a truck driver. However, the Wisconsin courts' conclusion that Frito-Lay is not subject to the federal

regulation because some of its routes were solely within the state of Wisconsin and, therefore, not in interstate commerce, effectively places Frito-Lay in the untenable position of having a conflict between its duty to the federal government and its duty to the state of Wisconsin. It and others who engage in the interstate shipment of goods, but also have some intrastate driving routes as part of the delivery system for their products, face a very substantial risk of similar Hobbesian choices, as each of the 46 states that have legislation prohibiting discrimination against handicapped individuals may be afforded its opportunity to decide whether or not interstate commerce is involved. The prospect of 46 different standards emerging is not one that should be viewed with equanimity. Although this case has orginated from the problem of a single driver of one company in one state, the issues it raises are indeed substantial ones under federal law and are within the jurisdiction of this Court for plenary review on an appeal of right under 28 U.S.C. §1257(2) (1976).

Even if the Wisconsin courts were correct in deciding that Frito-Lay's deliveries within Wisconsin were not in interstate commerce, there is another important federal question that should be addressed by this Court. It is undisputed that Frito-Lay had structured its shipping system from the Beloit terminal in a manner that commingled out-of-state and in-state delivery points. The Wisconsin courts acknowledged that a motor carrier whose operations commingle interstate and intrastate services is subject to the federal regulations under the Motor Carrier Act. (Appendix, A13.) *See Morris v. McComb*, 322 U.S. 422 (1947) (holding that a carrier and its drivers were engaged in interstate commerce under the Motor Carrier Act, even though interstate activities represented only 3% to 4% of the carrier's total services, where

performance of interstate and intrastate services were commingled and shared indiscriminately among the employees).

Yet, the Wisconsin courts have now ordered Frito-Lay not to commingle interstate and intrastate services, so that Wisconsin's less stringent standards for drivers may be applied to the intrastate activities. To this end, Frito-Lay has been required to create a special "intrastate" route for Mr. Lyons, rather than to use its commingled delivery system and its normal bidding procedures based on seniority to select drivers for the delivery runs.

This extraordinary usurpation of authority by a state, to direct an interstate business to restructure itself to perform its operations in a manner that will create an activity subject to state regulation, is an undue burden on interstate commerce and must not escape review. What the Wisconsin courts have done in their application of the Wisconsin statute in this case is similar to what the legislature of South Carolina had done directly by the statute considered in *Toomer v. Witsell,* 334 U.S. 385 (1948). In that case, South Carolina's statute required owners of shrimp boats that fished in the waters off that state's coastline to dock at a South Carolina port and unload the catch there before reshipping it to any other state. The record showed that a high portion of the shrimp catch from South Carolina was shipped in interstate commerce. Even though South Carolina had an interest in shrimp taken in its waters, this Court concluded that the statute unconstitutionally burdened interstate commece because, *inter alia,* "the necessary tendency of the statute is to impose an artifical rigidity on the economic pattern of the industry." *Id.* at 403-404. Here, an analogous artificial pattern will be imposed on Frito-Lay and other interstate businesses who now commingle interstate and

intrastate delivery systems in Wisconsin. Instead, they will be required to segregate intrastate deliveries and to adopt systems for assigning drivers to delivery routes that insure that drivers who cannot meet federal standards will receive the intrastate runs. The question of whether this kind of imposition on interstate businesses violates the Commerce Clause is an important issue in itself that should be reviewed by this Court upon plenary consideration of the merits of Frito-Lay's appeal.

Moreover, on the merits, appellant submits that review also is necessary to correct the erroneous conclusion of the Wisconsin Court of Appeals and the Wisconsin Supreme Court that Frito-Lay's delivery routes that did not cross state lines were therefore not part of interstate commerce. This interpretation flies in the face of many decisions of this Court that have recognized the expansive nature of "interstate commerce."

However, most cases involving questions of interstate commerce must be decided in regard to particular and often narrow fact situations. As early as 1905, Justice Holmes wrote that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States,* 196 U.S. 375, 399 (1905). In *Atlantic Coastline Railroad v. Standard Oil Co.,* 275 U.S. 257 (1927), this Court noted that:

> The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character.

Id. at 268.

The evidence in this case reveals that virtually every truck that leaves the Beloit terminal contains both products manufactured by Frito-Lay outside of Wisconsin and

shipped into that state by truck, and products manufactured at the Beloit plant. The products that come from other locations to the Beloit terminal remain there at most for three days before resuming their journey to various retailers within a five-state area. The truck loads of products that are delivered to the Beloit terminal are merely unloaded and then redistributed to other trucks that originate at the Beloit terminal. There is no repackaging or reprocessing of these goods in any way.

The Wisconsin Court of Appeals rejected the significance of these facts and attempted to distinguish cases like *Beggs v. Kroger Co.*, 167 F.2d 700 (8th Cir. 1948), and *Shew v. Southland Corp.*, 370 F.2d 376 (5th Cir. 1966), on the grounds that in those cases, the out-of-state shipments were made pursuant to pre-existing orders from branches of the company that owned the distribution facility. Yet, that kind of distinction cannot be controlling for a proper interpretation of interstate commerce under federal law. As this Court stated in *Atlantic Coastline Railroad v. Standard Oil Co., supra,* "the determination of the character of the commerce is a matter of weighing the whole group of facts in respect to it." 275 U.S. at 268.

Here, although there is no indication whether or not there were pre-existing orders, the fact remains that the goods were being delivered in their original packages for virtually immediate (in any case, no more than three days) shipment to other locations. Their stay in the Beloit terminal was merely a temporary interruption in the flow of interstate commerce. Indeed, in almost ten percent of the cases, the out-of-state loads were not even unpacked at the Beloit terminal, but were delivered directly to retail customers by drivers from the Beloit terminal. Here, the evidence should have pointed to but one conclusion — that the integration of

manufacture inside and outside of the state of Wisconsin and delivery immediately to points either within or without Wisconsin, shows that the interstate character of the flow of goods to the retailers continues unabated until the ultimate delivery of the products to the retailers. It is thus similar to the facts that resulted in this Court's conclusion in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-68 (1943):

> There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. . . .[I]f the halt in the movement of goods is a convenient intermediate step in the processing of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.

Yet, the Wisconsin Court of Appeals has imposed precisely this kind of rigid formality that focuses unduly on the fact that the products manufactured at plants outside of the state of Wisconsin might be warehoused for up to three days before being reshipped to destinations in Wisconsin. Appellant submits that the Wisconsin courts, in their eagerness to uphold the validity of the Wisconsin statute and to apply it to Frito-Lay, seriously misanalyzed relevant precedent defining "interstate commerce." This misguided effort to avoid Frito-Lay's challenge to the validity of the Wisconsin statute as applied to it should now be reviewed by this Court.

For the foregoing reasons, appellant maintains that this Court has jurisdiction over this appeal pursuant to 28 U.S.C.

§1257(2)(1976) and that the federal questions raised by the appeal are sufficiently important to warrant plenary consideration by this Court.

Respectfully submitted,

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APPENDIX

FRITO-LAY, INC.,

Petitioner-Respondent-Petitioner,

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent,

James Lyons, Appellant.

No. 79-238,

Supreme Court of Wisconsin.

Argued Feb. 10, 1981.

Decided March 31, 1981.

Appeal from Circuit Court, Dane County; William F. Eich, Judge.

PER CURIAM.

The court is equally divided on the question of whether to affirm or reverse the decision of the Court of Appeals, 95 Wis.2d 395, 290 N.W.2d 551. Justice Heffernan, Justice Day, and Justice Abrahamson would affirm; Justice Callow, Justice Coffey, and Justice Steinmetz would reverse. Chief Justice Beilfuss did not participate.

Accordingly, the decision of the Court of Appeals is affirmed.

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

Madison, May 4, 1981

To James T. Murray, Jr.
Borgelt, Powell, Peterson
& Frauen
735 N. Water St.
Milwaukee, WI 53233

David C. Rice
Asst. Attorney General

Bruce F. Ehlke
Lawton & Cates
110 E. Main St.
Madison, WI 53703

The Court today announced an order in your case as follows:

FRITO-LAY, INC. V. LABOR & INDUSTRY REVIEW COMM., #79-238.

Motion for Reconsideration denied without costs.

MARILYN L. GRAVES

Clerk of Supreme Court.

FRITO-LAY, INC.,
Petitioner-Respondent,
v.
WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, Respondent,
James Lyons, Appellant.
No. 79-238.

Court of Appeals of Wisconsin.

Submitted on Briefs Oct. 12, 1979.

Opinion Released Feb. 18, 1980.

Opinion Filed Feb. 18, 1980.

Before GARTZKE, P. J., and BABLITCH and DYKMAN, JJ.

GARTZKE, Presiding Judge.

Complainant, James R. Lyons, has appealed from the order of the circuit court which set aside the order of the Wisconsin Labor and Industry Review Commission. The commission concluded that the respondent, Frito-Lay, discriminated against complainant because of his physical handicap in violation of the Wisconsin Fair Employment Act, sec. 111.31 *et seq.*, Stats. 1973, and ordered that he be reinstated as an employee.[1]

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[1]Section 111.325, Stats. 1973, provides that it is unlawful for any employer to discriminate against any employee. Section 111.32 Stats. 1973, provides in material part:

(5)(a) "Discrimination" means discrimination because of . . . handicap . . . by an employer . . . against any employee . . . in regard to his hire, tenure or term, condition or privilege of employment . . . .

(f) The prohibition against discrimination because of handicap does not apply to failure of an employer to employ or to retain as an employe any person who because of a handicap is physically or otherwise unable to efficiently perform, at the standards set by the employer, the duties required in that job. . . .

The commission found that complainant was employed by Frito-Lay at its Beloit, Wisconsin plant for almost five years until he was discharged. He had no chargeable accidents in that period. He worked as a truck driver at the Beloit plant during that period and drove trucks for over thirteen years before he began work for Frito-Lay. He has had a regular Wisconsin driver's license and a chauffeur's license for over twenty years, both of which were granted after he passed a sight examination, in spite of amblyopia (lazy eye) in his left eye. Frito-Lay laid him off in October 1975 pending a status check on his eye condition. Two ophthalmologists who examined complainant indicated that he was fully capable of continuing to drive a truck.

Frito-Lay discharged complainant October 31, 1975 because his eye condition did not meet the physical qualifications of the United States Department of Transportation (DOT) for truck drivers in interstate commerce.[2]

The commission found that Frito-Lay's Beloit plant had interstate and intrastate truck runs and a system by which

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[2]The effect of the DOT's regulation, 49 C.F.R. sec. 391.41(b)(10), is to prevent a person from driving a truck for a motor carrier in interstate commerce (with exceptions not pertinent) unless the person, "Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses . . . ." Complainant has only 20/200 visual acuity in his left eye and the condition cannot be corrected.

Frito-Lay attempted to extricate itself and complainant from the conflict between state and federal regulations. Frito-Lay requested a waiver of the DOT's visual acuity requirements. The DOT's Bureau of Motor Carrier Safety denied the request in December 1975. Its letter enclosed a position paper which states that the bureau "has completed a recent research effort to reevaluate the current visual and auditory requirements for drivers to safely operate a commercial motor vehicle. The results of this study fail to support any relaxation of our present visual requirements."

drivers determined their runs through seniority bidding. All drivers senior to complainant agreed to leave daily intrastate runs to him and to give him the "spotter" position in Beloit, which would allow him to stay inside Wisconsin.

The commission found that complainant was able safely and efficiently to perform the job duties of a truck driver on intrastate runs at the employer's standards and concluded that Frito-Lay discriminated against complainant because of his handicap.

The circuit court held that Frito-Lay and its drivers at the Beloit plant were engaged in interstate commerce and that the DOT physical qualifications must be met by every driver. The court held that even if Frito-Lay created a run wholly within Wisconsin for complainant, he would nevertheless be delivering goods in the stream of interstate commerce. The court therefore set aside the commission's order.

The unchallenged facts upon which the circuit court relied are as follows: The Beloit plant is both a manufacturing facility and a shipping terminal. It does not produce a complete line of Frito-Lay snack foods. Additional products are shipped to the Beloit plant from plants located outside Wisconsin. The products received from outside plants are not repackaged and are delivered with products produced in Beloit. All products are delivered by truck from Beloit to retailers in Wisconsin, Minnesota, Michigan, Iowa and Illinois. Wisconsin retailers receive about thirty-eight percent of the deliveries from Beloit. Under ten percent of the products manufactured by out-of-state plants are delivered by Beloit drivers directly to retailers without being reloaded onto trucks with Beloit products. Few products received from plants located outside Wisconsin remain at the Beloit warehouse longer than three days.

We note that orders are received at the Beloit plant and are filled from the products in the warehouse as well as from products manufactured at the plant. The record is silent as to whether the shipments from out-of-state origins to Beloit are made to fill preexisting orders from retailers, except for loads that are direct shipments to specific locations. The latter constitute less than ten percent of all loads handled by Beloit drivers.

Agency findings and orders under the Wisconsin Fair Employment Act are subject to review under ch. 227, Stats. sec. 111.37, Stats. 1973. The scope of our review is the same as that of the circuit court under sec. 227.20. *Sanitary Transfer & Landfill, Inc. v. DNR,* 85 Wis.2d 1, 12, 270 N.W.2d 144 (1978). Questions of law decided by the agency are judicially reviewable under sec. 227.20(5). *Pabst v. Department of Taxation,* 19 Wis.2d 313, 322, 120 N.W.2d 77 (1963). The application of a statute to a particular set of facts is a question of law. *Bucyrus-Erie Co. v. ILHR Department,* 90 Wis.2d 408, 417, 280 N.W.2d 142 (1979), and cases cited.

Where the material facts are not in dispute and the only question is one of law, the court may substitute its judgment for that of the agency. *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd.,* 88 Wis.2d 293, 308, 276 N.W.2d 716 (1979); *Hall Chevrolet Co., Inc. v. Dept. of Revenue,* 81 Wis.2d 477, 483, 260 N.W.2d 706 (1978).

As the commission found that the employer discriminated against the complainant, the burden is upon Frito-Lay to show that its actions were exempt under the Wisconsin Fair Employment Act or otherwise. *Chicago, M., St. P. & P. R.R. Co. v. ILHR Dept.,* 62 Wis.2d 392, 215 N.W.2d 443 (1974).

The issue on appeal is whether Frito-Lay has shown that complainant must meet the physical qualifications established by the DOT for persons who drive motor vehicles for motor carriers.

The DOT's requirements if applicable prevail over lesser requirements established by the state. Frito-Lay is a private carrier of property by motor vehicle, as defined in sec. 203(a)(17) of Interstate Commerce Act—Part II [49 U.S.C. sec. 303(a)(17)]. Part II of the Interstate Commerce Act is also known as the Motor Carrier Act. Congress provided by sec. 204(a)(3) of the Motor Carrier Act [49 U.S.C. sec. 304(a)(3)] that the Interstate Commerce Commission may prescribe qualifications for employees of private motor carriers and transferred that power in 1975 to the Secretary of Transportation. 49 U.S.C. sec. 1655(e)(6)(C). The DOT has established minimum qualifications for persons who drive motor vehicles for motor carriers. 49 C.F.R. sec. 391.1 *et seq.*[3]

Congress "adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced." *Castle v. Hayes Freight Lines,* 348 U.S. 61, 63, 75 S.Ct. 191, 192, 99 L.Ed. 68 (1954). The regulations establishing minimum qualifications for interstate drivers do not prevent a state from prescribing additional qualifications which are "not inconsistent or in conflict with" those regulations. *Buck v. California,* 343 U.S. 99, 101-02, 72 S.Ct. 502, 504, 96 L.Ed. 775 (1952). The visual acuity requirements of this state for truck drivers are less than and are inconsistent with the DOT's regulations.

[3]A private carrier of property is a "motor carrier" for purposes of enforcement of safety regulations. *See* sec. 204(a)(3) and (c) of the Motor Carrier Act [49 U.S.C. sec. 304(a)(3) and (c)].

Frito-Lay is therefore subject to the DOT driver qualifications if Frito-Lay is subject to the Motor Carrier Act.

The circuit court concluded that movements from the Beloit plant were in interstate commerce and that Frito-Lay was therefore subject to the Act, primarily on the basis of *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 63 S.Ct. 332, 87 L.Ed. 460 (1943). The issue in *Walling* was whether employees at branch warehouses at which interstate shipments of merchandise were received were "engaged in commerce" within the meaning of the Fair Labor Standards Act, 52 Stats. 1060, c. 676 [29 U.S.C. sec. 201 *et seq.*].

Walling is not controlling because it did not involve the interstate [sic] Commerce Act. "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce." *McLeod v. Threlkeld,* 319 U.S. 491, 495, 63 S.Ct. 1248, 1250, 87 L.Ed. 1538 (1943). Construction of every statute regulating "interstate commerce" presents "a unique problem in which words derive vitality from the aim and nature of the specific legislation." *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 (1941).

> As pointed out in *Tucker v. Casualty Reciprocal Exchange,* 40 F.Supp. 383 (N.D. Ga.1941), "the [Interstate Commerce] Act does not purport to regulate all acts and matters indirectly related to interstate transportation by motor carriers." The question before this Court is whether the transportation at issue was in interstate or foreign commerce within the meaning . . . of the Interstate Commerce Act . . . . *Southern Pac. Transp. Co. v. I. C. C.*, 565 F.2d 615, 617 (9th Cir. 1977).

We must determine whether Frito-Lay showed that all of its truck movements from Beloit are in interstate commerce, as defined by the Motor Carrier Act. Section 203(a) of the

Act [49 U.S.C. sec. 303(a)] provides that as used in the relevant part of the Act: "(10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State . . . ."

The record includes the details of truck runs routed by Frito-Lay from Beloit during twenty-two days in August and September 1976. So far as we can determine, during that period Frito-Lay had 647 truck runs, 163 of which involved only Wisconsin destinations.

The record therefore contains substantial evidence for the finding by the commission that Frito-Lay had intrastate runs from its Beloit plant, so far as that finding is one of fact. Frito-Lay contends, however, that the runs from Beloit to Wisconsin retailers are nevertheless in interstate commerce because they closely follow the interstate movements to the warehouse.

Transportation wholly between points within a single state, even if immediately subsequent to transportation by another carrier from a point in another state, is not necessarily interstate commerce subject to economic regulation by the Interstate Commerce Commission. Thus, that commission concluded that for-hire motor transportation, between points within a single state, of property which has moved from, or will move to points beyond that state in private motor carriage, is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under the Motor Carrier Act. *Motor Transportation of Property Within A Single State,* 94 M.C.C. 541 (1964), *aff'd. sub nom. Pennsylvania Railroad Co. v. United States,* 242 F.Supp. 890 (E.D.Pa. 1965), *aff'd. per curiam,* 382 U.S. 372, 86 S.Ct. 533, 15 L.Ed.2d 421 (1966), 384 U.S. 914, 86 S.Ct. 1334, 16 L.Ed.2d 366 (1966).

We look for guidance to the decisions of the Interstate Commerce Commission because it is charged with the administration of the Motor Carrier Act. *See* sec. 204 of the Act [49 U.S.C. sec. 304]. An interpretation by that commission of the Act is entitled to great weight. *United States v. American Trucking Associations,* 310 U.S. 534, 549, 60 S.Ct. 1059, 1067, 84 L.Ed. 1345 (1940). The same is true of interpretations by the DOT of sec. 204(a)(3). No decisions by either agency determining the nature of interstate commerce, for purposes of sec. 204(a)(3), have been brought to our attention.

In the absence of a ruling by the Interstate Commerce Commission or the DOT to the contrary, we assume that "interstate commerce" means the same, whether the issue is jurisdiction to prescribe driver qualifications for private motor carriers under sec. 204(a)(3) of the Act or jurisdiction to issue operating authorities to for-hire carriers under secs. 206 and 209 of the Motor Carrier Act. [49 U.S.C. secs. 306 and 309].

The Interstate Commerce Commission considered the problem of determining the character of motor carrier transportation between points in a single state from a distribution point supplied by shipments from another state in *Petroleum Products Transported Within A Single State,* 71 M.C.C. 17 (1957). The commission noted the landmark decision in *Atlantic Coast Line R. Co. v. Standard Oil Co.,* 275 U.S. 257, 268, 48 S.Ct. 107, 110, 72 L.Ed. 270 (1927), which involved the character of movements from a distribution point to points in the same state and where it is said:

> The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of

> circumstances tending to show such character. The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement or prevent the shipment to a point within the same state from having an independent or intrastate character . . . .

Relying in part upon its precedents involving the transportation of commodities which had a prior movement in interstate commerce to a warehouse, the commission stated that in determining the essential character of the movement from the distribution point, "the factor most often relied on is the fixed and persisting transportation intent of the shipper at the time of shipment." 71 M.C.C. 17, 27, 29. The Interstate Commerce Commission concluded:

> As applied to the type of traffic here involved, the major manifestations of this intent, or the absence thereof, may be found in the following: (1) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, (2) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (3) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage. These things, it is believed, are basically sufficient to establish that the continuity of transportation has been broken, that the initial shipments have come to rest, and that the interstate journey has ceased. 71 M.C.C. 17, 29.

The truck runs from the Beloit plant involving deliveries exclusively in Wisconsin have not been shown to be in interstate commerce under the three-part test established by the Interstate Commerce Commission. Frito-Lay offered no evidence that the out-of-state products received at the Beloit plant were shipped to that plant pursuant to specific orders

for specific quantities to be moved through to a specific destination in Wisconsin.[4] The first part of the test to establish the continuity of transportation for interstate commerce has not been met. The truck shipments from the plant are arranged after orders are received at the Beloit plant which are filled from the products that are in the Beloit warehouse as well as products manufactured at Beloit. The Beloit distribution manager testified that the loads are made up on the basis of those orders. The commission could have found a break in the continuity of transportation under the second and third parts of the test.

Frito-Lay relies upon *Beggs v. Kroger Co.*, 167 F.2d 700 (8th Cir. 1948), and *Shew v. Southland Corporation (Cabell's Dairy Div.)*, 370 F.2d 376 (5th Cir. 1966), as authority that the truck runs from Beloit to Wisconsin retailers are in interstate commerce. Neither citation is apposite. In *Beggs* a company maintained a warehouse and company-owned stores in Arkansas. The company knew when out-of-state shipments to the warehouse began that the shipments were destined to its retail stores. None of the goods that entered the warehouses were resold. *Beggs* held that the warehouse "was merely a convenient instrumentality for the division of the shipments coming to it and the continuation of the movement of each part to the retail stores." 167 F.2d 700, 703. The facts in *Shew* are similar to those in *Beggs*. The distribution point in *Shew* was supplied

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[4]We cannot determine whether the direct shipments to specific destinations which we understand were handled by Beloit drivers and constitute less than ten percent of all loads handled by those drivers, moved to the plant for unloading or moved directly to the destination without unloading. If those loads are in interstate commerce, the fact remains that they constitute a small portion of the runs handled by Beloit drivers.

by out-of-state shipments made pursuant to preexisting orders from branches of the company which owned the distribution facility. 370 F.2d 376, 378, 380. Here the Beloit plant functions as a warehouse to serve customers, not company-owned outlets.

The question remains whether Frito-Lay has shown that all its drivers must comply with DOT physical qualifications because Frito-Lay has interstate truck runs, even if it also has intrastate runs.

Substantial evidence exists for the commission's finding that Frito-Lay's Beloit plant had interstate runs, so far as that finding is factual. So far as we can determine, during the twenty-two day period in 1976, Frito-Lay had 484 runs which included a delivery outside Wisconsin. Some out-of-state product is delivered by Beloit drivers directly to retailers. As those truck shipments cross a state line, they are interstate commerce as defined by sec. 203(a) of the Motor Carrier Act.

If a motor carrier operates in interstate and intrastate commerce and all its drivers handle or may be assigned to handle interstate and intrastate traffic, then the Interstate Commerce Commission (now the DOT) has the power to establish driver qualifications for all the carrier's drivers pursuant to sec. 204 of the Motor Carrier Act. *Morris v. McComb,* 332 U.S. 422, 432-34, 68 S.Ct. 131, 136, 92 L.Ed. 44 (1947).

If, however, the carrier operates in interstate and intrastate commerce but certain of its drivers handle only intrastate traffic, then the Interstate Commerce Commission does not have the power to establish qualifications as to those drivers. *Goldberg v. Faber Industries, Inc.,* 291 F.2d 232 (7th Cir. 1961). The Interstate Commerce Commission in its brief amicus curiae agreed in *Goldberg* that it had no power or jurisdiction over the intrastate drivers. 291 F.2d 232, 235.

Frito-Lay determines the points at which deliveries will be made on each truck run. Frito-Lay does not assign drivers to truck runs. The drivers assign themselves through seniority bidding and those senior to complainant have agreed to give him intrastate runs. As Frito-Lay has not shown that all its runs from Beloit to Wisconsin points are in interstate commerce, the visual acuity qualifications established by the DOT for truck drivers have not been shown to apply to complainant if he handles runs from Beloit exclusively to Wisconsin points.

The duties of the "spotter" position have not been detailed in the record. It may be that position, which apparently involves movements wholly within the yard of the plant, is also exempt under 49 C.F.R. sec. 391.2(a), which relates to movements wholly within a municpality or the commercial zone thereof as defined by the Interstate Commerce Commission, as provided in 49 C.F.R. sec. 390.16. If driving as a "spotter" is in fact exempt from 49 C.F.R. sec. 391.1 *et seq*., then it would appear that complainant may fill that position without meeting the minimum driver qualifications established by the DOT.

We conclude that Frito-Lay has failed to show that its discriminatory action against complainant is exempt under the Wisconsin Fair Employment Act or otherwise.

The order of the circuit court is reversed and vacated.

State of Wisconsin Circuit Court Branch 4 Dane County

FRITO-LAY, INC.,

Petitioner,

vs.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND JAMES LYONS,

Respondents.

MEMORANDUM DECISION
Case No. 160-097

Petitioner Frito-Lay, Inc. seeks review and reversal of an order of the Department of Industry, Labor & Human Relations (DILMR) Commission. The Commission adopted the hearing examiner's proposed decision finding Frito-Lay in violation of the Wisconsin Fair Employment Act, sec. 111.32 (5) (a), Stats., for having terminated James R. Lyons' employment as a truck driver because of his visual handicap [Lyons suffers from amblyopia ("lazy eye") in his left eye, with resulting uncorrectable visual acuity in that eye of 20/200 (Snellen). Lyons' visual acuity in his right eye is 20/20.]

Frito-Lay argues that the finding of discrimination is unwarranted in light of sec. 111.32(5) (f), Stats., which provided, at the time Lyons was discharged, that:

> "The prohibition against discrimination because of handicap does not apply to failure of an employer to

> employ or to retain as an employe any person who because of a handicap is physically or otherwise unable to efficiently perform, at the standards set by the employer, the duties required in that job."

Lyons was discharged on January 22, 1976. Effective May 27, 1976, this subsection was amended to read that termination because of handicap is discriminatory "unless such handicap is reasonably related to the individual's ability adequately to undertake the job-related responsibilities of that individual's employment."

Frito-Lay claims that Lyons' visual disability renders him "physically or otherwise unable to efficiently perform," because he cannot operate a truck in interstate commerce without violating the federal Motor Carrier Act, 49 U.S.C. 301, et seq. Section 391.41 of Title 49 C.F.R. 391, regulations established by the Department of Transportation pursuant to the Act, provides as follows:

> "(b) A person is physically qualified to drive a motor vehicle if he —
>
> (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses. . ."

The critical question in this case is whether all of Frito-Lay's drivers must meet the vision requirements set forth above. If the federal standards are applicable to all drivers, then Lyons is physically unable to perform his job responsibilities, and his termination was not discriminatory under the Wisconsin act.

Implicit in DILHR's conclusion of law that Lyons was the victim of handicap discrimination is the assumption that

Lyons is exempt from compliance with the federal law if he drives solely within Wisconsin. DILHR found, as a matter of fact, that Frito-Lay's Beloit plant had both *inter*state and *intra*state truck runs. Since a truck involved in intrastate commerce within the boundaries of the state of Wisconsin need meet only the less stringent Wisconsin requirement of a minimum of 20/30 visual acuity in one eye when vision in the other eye is less than 20/40, DILHR concluded that Lyons was physically qualified to carry out the duties of his job with Frito-Lay because he could drive in Wisconsin.

DILHR's interpretation of the scope of interstate commerce (and, therefore, the application of the federal vision requirements to Lyons' situation) is, in my opinion, incorrect, and I hereby set aside the DILHR order, pursuant to sec. 227.20(5), Stats., and dismiss Lyons' complaint against Frito-Lay, Inc.

As used in the Motor Carrier Act, "interstate commerce" is defined to mean "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by rail, express or water." 49 U.S.C. sec. 303(a) (10). In *Atlantic Coast Line Railroad Company v. Standard Oil Company of Kentucky,* 275 U.S. 257, 268, 72 L.Ed. 270, 274 (1927), Mr. Chief Justice Taft, writing for the Court, stated that:

> "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character."

And in *Swift & Company v. United States,* 196 U.S. 375, 399, 49 L.Ed. 518, 525 (1905), Mr. Justice Holmes wrote that "commerce among the states is not a technical legal

conception, but a practical one, drawn from the course of business."

The undisputed facts outlining the manner in which Frito-Lay markets its products are as follows:

> Frito-Lay, Inc., headquartered in Dallas, Texas, maintains a manufacturing plant and shipping terminal in Beloit, Wisconsin. The Beloit plant does not produce a complete line of Frito-Lay snack foods. Therefore, additional products are shipped into the Beloit plant from plants outside Wisconsin. These goods are not repackaged upon arrival in Beloit; they are placed on delivery trucks along with products that originate in Beloit. All products are delivered to retailers in Wisconsin, Minnesota, Michigan, Iowa and Illinois. Wisconsin retailers account for approximately 38% of the deliveries from the Beloit plant. Under 10% of the products manufactured out-of-state would be delivered by Beloit drivers to retailers without being reloaded onto trucks with Beloit products. Few out-of-state products remain at the Beloit warehouse longer than three days.

In *Walling v. Jacksonville Paper Company,* 317 U.S. 564, 87 L.Ed. 460 (1943), the employer company was engaged in the wholesale business of distributing paper products among several states. The issue before the Court was whether employees at seven branch houses—at which interstate shipments of merchandise were received—were involved in interstate commerce if they did not personally distribute the merchandise across state lines. Justice Douglas wrote for the Court as follows:

> "There is no indication. . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that

> purpose. . . .[I]f the halt in the movement of goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce." *Walling,* 317 U.S. 567-68, 87 L.Ed. 466.

Considering that a portion of the goods shipped by Beloit truckers originate out-of-state, and that approximately two-thirds of the shipped goods are destined for out-of-state use, it seems to me the wiser view that Frito-Lay and the truckers employed at the Beloit plant are engaged in interstate commerce and that federal standards must be met by each driver. Even if Frito-Lay created a "run" for Lyons that did not take him outside Wisconsin, he would be delivering goods that are in the stream of interstate commerce.

The case at bar is distinguishable from *Chicago and Northwestern Transportation Company v. Wisconsin Department of Industry, Labor and Human Relations and James Doetze,* Dane County Circuit Court Case No. 157-101 (1978). As I noted on page 2 of that decision, there is no visual acuity standard set forth in the Railroad Safety Act: "In such circumstances discharging an employee within a state, even from an interstate job, is subject to the state's police power."

Counsel for Frito-Lay may prepare an appropriate order for my signature.

Dated at Madison, Wisconsin, this 14th day of December, 1978.

BY THE COURT:

/s/ William F. Eich
WILLIAM F. EICH
CIRCUIT JUDGE

cc: James T. Murray, Jr., Atty. for Pet.
David C. Rice, Ass't Atty. Gen.
Bruce F. Elke, Atty. for James Lyons

State of Wisconsin Circuit Court Dane County

FRITO-LAY, INC.,

Petitioner,

vs.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND JAMES LYONS,

Respondents.

ORDER

Case No. 160-097

The above captioned matter having come before the court, The Honorable William F. Eich, Circuit Court Judge

presiding, on June 19, 1978, for oral argument on the Petition For Review by Frito-Lay, Inc. of an Order of the Wisconsin Labor & Industry Review Commission (WFE), and the Petitioner having been represented at such hearing by Attorney James T. Murray, Jr. of Borgelt, Powell, Peterson & Frauen S.C., Milwaukee, Wisconsin, and the Wisconsin Labor and Industry Review Commission having been represented at such hearing by Assistant Attorney General David C. Rice of the Wisconsin Department of Justice, and Respondent James Lyons having been represented at such hearing by Attorney Bruce L. Ehlke of Lawton & Cates, and the Court having considered the oral arguments of the parties together with the written briefs and the entire file herein, and the Court having rendered a Memorandum Decision on December 14, 1978, holding that the Petitioner did not engage in proscribed handicap discrimination against James Lyons, now, therefore,

IT IS HEREBY ORDERED that the Complaint of James Lyons in this matter before the Equal Rights Division is hereby dismissed and the Order of the Wisconsin Labor and Industry Review Commission in this matter, dated October 14, 1977, is hereby vacated and set aside. (W.F.E.)

Dated at Madison, Wisconsin this 9th day of January, 1979.

/s/ William Eich
THE HONORABLE WILLIAM F. EICH,
CIRCUIT COURT JUDGE, DANE COUNTY

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

James R. Lyons
7824 Morrisonville Road, Route 1
DeForest, Wisconsin 53532
Complainant

ORDER
ERD CASE #7600178

vs.

Frito-Lay, Inc.
P. O. Box 357
Beloit, Wisconsin 53511
Respondent

The examiner issued his proposed decision on April 28, 1977. Timely exceptions were filed and written arguments were submitted to the Commission.

Based upon a review of the record in its entirety the Labor and Industry Review Commission issues the following:

ORDER

That the attached proposed decision of the examiner is adopted in its entirety and shall stand as the final order herein.

Dated at Madison, Wisconsin, this 14th day of October, 1977.

/s/ Virginia B. Hart
Virginia B. Hart

/s/ John R. Hayon
John R. Hayon

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND
HUMAN RELATIONS
EQUAL RIGHTS DIVISION

James R. Lyons
7824 Morrisonville Road, Route 1
De Forest, Wisconsin 53532
Complainant

PROPOSED DECISION

vs

ERD Case #7600178

Frito-Lay, Inc.
P.O. Box 357
Beloit, Wisconsin 53511
Respondent

Complainant filed a complaint with the Department of Industry, Labor and Human Relations, Equal Rights Division, alleging handicap discrimination by Respondent in discharge in violation of the Wisconsin Fair Employment Act Section 111.31—111.37 Wisconsin Statutes (hereafter "Act"). Probable cause was found and conciliation was

unsuccessful or waived. Hearing was held before Hearing Examiner Henry E. Sanders, who prepared the Summary of Proceedings in the case. Mr. Sanders left the Department prior to rendering a Proposed Decision, and the case was transferred to another examiner duly authorized by the Department for Decision. Based upon the Summary of Proceedings, the following Proposed Decision is rendered:

FINDINGS OF FACT

1. Complainant was an employee of Respondent, Frito-Lay, Inc. in good standing for almost five years, until his termination in October, 1975.
2. Respondent is an employer producing and delivering snack foods, with national headquarters in Texas, and a plant in Beloit, Wisconsin.
3. Complainant performed as a truck driver for Respondent throughout his tenure, and had a reputation as a good, dependable driver, having had no chargeable accidents.
4. Complainant drove trucks prior to working for Respondent for over thirteen years, including two years in the Army as a number one lead driver.
5. Complainant has had a regular Wisconsin Driver's License and a Chauffeur's License for over twenty years in the State of Wisconsin, both of which were granted after he passed a sight examination. Complainant's only restriction for driving under both licenses is "left outside mirror."
6. Since birth, Complainant has had amblyopia (lazy eye) in his left eye, a condition for which there is no known cure. His vision in his left eye has been recorded as 20/200. His vision in his right eye has been recorded as 20/20 without corrective lenses.
7. Upon application for employment with Respondent, Complainant indicated his eye condition and Respondent was made aware of his vision.
8. Complainant took an eye examination at Respondent every two years that was given by physicans selected by Respondent, and Complainant passed every such eye exam.

9. In October, 1975, Complainant was laid off pending a status check on his eye condition, although no incidents had occurred relating to his eyesight during his employment up to that date.
10. After his lay off, Complainant was examined by two opthalmologists, one of whom was selected by Respondent.
11. Both physicians indicated that in spite of his amblyopia in his left eye, Complainant had well compensated for his condition and was fully capable of continuing to drive truck as he had been doing for twenty years without problem.
12. At all times relevant to Complainant's complaint, Respondent's Beloit plant had both interstate and intrastate truck runs.
13. At all times relevant to Complainant's complaint, Respondent's Beloit plant had a bidding system whereby truckers determined their runs by seniority bidding.
14. After learning of Complainant's lay off related to his eye condition, all drivers senior to Complainant unanimously agreed verbally to leave Complainant intrastate runs each day. In addition to agreeing to give Complainant all intrastate runs, the drivers agreed to allow Complainant the "spotter" position in Beloit, which would allow him to stay inside Wisconsin.
15. Under Federal regulations of the Department of Transportation, commercial truck drivers may not drive interstate without a minimum vision of 20/40 in each eye.

16. Under Wisconsin regulations and the Federal Department of Transportation regulations, a commercial truck driver with a chauffeur's license, on intrastate runs in Wisconsin, must have a minimum vision in either eye with or without glasses of 20/40 vision, unless the driver is hauling explosives, which Respondent Frito-Lay does not do.
17. Complainant was terminated as of October 31, 1975 because of his amblyopia.
18. Complainant was physically able to safely and efficiently perform the job duties of a truck driver on intrastate runs at the employer's standards.
19. Complainant took all available steps to find other employment since his termination in October, 1975.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of the Act.
2. Complainant is handicapped within the meaning of the Act by virtue of his amblyopia in his left eye.
3. Respondent discriminated against the Complainant on the basis of his handicap in terminating him, in violation of the Act.
4. Complainant satisfied his duty to mitigate his damages in his attempts to find other employment since his unlawful termination.

ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of his handicap.

2. That Respondent reinstate Complainant with all seniority and other benefits which would have been earned during the period since October 31, 1975, but for the unlawful discrimination.
3. That Respondent pay Complainant back pay for the time period for which he was out of work and unable to obtain employment from October 31, 1975 until this Order becomes final.
4. That Respondent allow Complainant to bid for intra-state runs and the spotter position, according to the agreement of the truck drivers who were senior to him prior to his termination.

/s/ Thomas W. Dale
Thomas W. Dale
Hearing Examiner

Dated at Milwaukee, Wisconsin this ____ day of April 28, 1977.

Twd:dv-R/9628

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 79-238

FRITO-LAY, INC.,

Petitioner-Respondent-Petitioner,

v.

WISCONSIN LABOR and INDUSTRY REVIEW COMMISSION,

Respondent,

JAMES LYONS,

Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Frito-Lay, Inc., Petitioner-Respondent-Petitioner, hereby appeals to the Supreme Court of the United States from the decision,order and final judgment of the Wisconsin Supreme Court filed and entered March 31, 1981, affirming the decision of the Court of Appeals of Wisconsin, and from the order of the Wisconsin

Supreme Court filed and entered May 4, 1981, denying Frito-Lay, Inc.'s Motion for Reconsideration.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

BORGELT, POWELL, PETERSON
& FRAUEN, S.C.
Attorneys for Frito-Lay, Inc.

By /s/ James T. Murray, Jr.
James T. Murray, Jr.

P. O. ADDRESS:
735 North Water Street
Milwaukee, Wisconsin 53202
Telephone (414) 276-3600

AFFIDAVIT OF SERVICE

STATE OF WISCONSIN

SS

MILWAUKEE COUNTY

The undersigned, being first duly sworn, says that a true copy of this document Notice of Appeal to the Supreme Court of the United States was served upon the hereinafter named person(s) by enclosing same in a postpaid envelope which bears the sender's name and return address and which was addressed to the hereinafter named person(s) at his last known proper post office and address and which was deposited in a United States Post Office depository in

Milwaukee, Wisconsin, on the 22nd day of July, 1981, bearing first class postage.

Clerk of Circuit Court for Dane County
Dane County Courthouse
210 Monona Avenue
Madison, Wisconsin 53709

Bruce F. Ehlke
Lawton & Cates
110 East Main Street
Madison, Wisconsin 53703

David C. Rice
Assistant Attorney General
114 East, State Capitol
Madison, Wisconsin 53702

/s/ Sandra L. Krueger
Sandra L. Krueger

Subscribed and sworn to before me
this 22nd day of July, 1981.
/s/ Kay M. Crabb
Notary Public, State of Wisconsin
My commission expires May 12, 1985

Constitution of the United States, Art. I, §8, cl. 3:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

49 U.S.C. §302(a) (1976):

The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provisions of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefore, is vested in the Interstate Commerce Commission.

49 U.S.C. §303(a) (10) (1976):

(a) As used in this chapter —

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water . . . .

49 U.S.C. §304(a) (3) (1976):

(a) It shall be the duty of the omission —

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. . . .

49 C.F.R. §390.32 (1980):

Whenever in Parts 390-397 of this subchapter a duty is prescribed for a driver or a prohibition is imposed upon him, it shall be the duty of the motor carrier to require observance of such prescription or prohibition; and, if the motor carrier is himself a driver, he shall likewise be bound thereby.

49 C.F.R. §391.41(b)(10) (1980):

(b) A person is physically qualified to drive a motor vehicle if that person —

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;

49 C.F.R. §392.2 (1980):

Every motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with.

Wis. Stat. §111.32(5)(a) (1977):

"Discrimination" means discrimination because of. . . handicap . . . by an employer . . . against any employee. . . in regard to his hire, tenure or term, condition or privilege of employment. . . .

Wis. Stat. 111.32(5)(f) (1977):

The prohibition of discrimination because of handicap does not apply to failure of an employer to employ or to retain as an employe any person who because of a handicap is physically or otherwise unable to efficiently perform, at the standard set by the employer, the duties required in that job.

BEFORE THE STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
EQUAL RIGHTS DIVISION

JAMES R. LYONS	)	
	)	
Complainant	)	
	)	
v.	)	ERD CASE NO.
	)	7600178
FRITO-LAY, INC.	)	
	)	
Respondent	)	

RESPONDENT'S POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now Frito-Lay, Inc., Respondent in the above-styled case and respectfully submits this Post-Hearing Brief

and Proposed Findings of Fact, Conclusions of Law and Order.

I. STATEMENT OF THE CASE

This action was instituted by a complaint filed with the State of Wisconsin, Department of Industry, Labor and Human Relations, Equal Rights Division on February 5, 1976 by Mr. James Lyons. In the charge of discrimination, Mr. Lyons alleges that Respondent terminated his employment because of his visual impairment and thereby discriminated against him because of a handicap in violation of Wisconsin Fair Employmet Act, Section 111.31-111.37, Wisconsin Statutes.

The charge of discrimination was investigated by the Department and a Finding of Probable Cause was subsequently entered by the Department. Conciliation was unsuccessful and the matter was certified for hearing.

Pre-existing orders from customers and the district court indicated that the Dallas plant was merely a convenient instrumentality for the division of shipments coming to it in route to their final destinations. A copy of the *Shew* decision is attached.

Thus it is clear that a driver need not cross state lines in order to be involved in "interstate commerce" as that term is used in the Motor Carrier Act. It is sufficient that the driver is transporting *goods* which are in "interstate commerce" for jurisdiction of the Department of Transportation to attach.

It is undisputed that Frito-Lay has only rare shipments at its Beloit distribution center which do not contain goods which have been in "interstate commerce" (SP pg. 19). Since the Complainant admittedly cannot qualify under the safety requirements established by the Department of

Transportation, it follows that he would not be entitled to drive for Respondent on trips which contained goods transported in interstate commerce.

It is well settled that where the federal government has properly enacted legislation which prohibits particular conduct, states may not require or permit such conduct to take place. In the instant case, if the Wisconsin Fair Employment Practices Act is interpreted to require that Complainant be allowed to drive on Respondent's trips which contain goods in interstate commerce, albeit wholly within the State of Wisconsin, then the Wisconsin Fair Employment Practices Act would be in conflict with the federal Motor Carrier Act, and consequently must give way to the federal law. This "preemption doctrine" is clearly set out in federal law Title 49, Part 392, Subpart A, paragraph 392.2:

COURT OF APPEALS OF WISCONSIN

District IV

Case No. 79-238

FRITO-LAY, INC.,

Petitioner-Respondent,

vs.

WISCONSIN LABOR and INDUSTRY REVIEW COMMISSION,

Respondent,

JAMES LYONS,

Appellant.

Appeal from an Order of the Circuit Court for Dane County.
The Honorable William F. Eich Presiding.

BRIEF OF PETITIONER-RESPONDENT

BORGELT, POWELL, PETERSON
& FRAUEN S.C.
740 North Plankinton Avenue
Milwaukee, Wisconsin 53203
Attorneys for Petitioner-Respondent

JAMES T. MURRAY, JR.
Of Counsel

II. FEDERAL LEGISLATION HAS PRE-EMPTED THE FIELD

Article 49 U.S.C. §304 empowers the Interstate Commerce Commission to regulate common carriers and contract carriers and establish for private carriers of property by motor vehicle, "reasonable requirements to promote safety of operation, and to that end prescribe

qualifications and maximum hours of service of employees . . ." Those duties have now been transferred to the Department of Transportation. Pub. L. 89-670, Oct. 15, 1966, 80 Stat. 931. 49 U.S.C. §302(a) provides that the provisions of the chapter apply to the transportation of passengers or property in interstate commerce and vests the responsibility for regulating such transportation in the Interstate Commerce Commission (now D.O.T.). 49 U.S.C. §303(10) defines "interstate commerce" as:

> "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water. . ."

Pursuant to its authority under 49 U.S.C. §304, the Federal Highway Administration has by regulation established minimum physical requirements for drivers subject to the Act, contained in 49 C.F.R., Transportation. Section 391.41(10) requires that a person shall not drive a motor vehicle unless he has:

> "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses. . ."

Section 390.32 of the F.H.A. regulations specifically provides that "it shall be the duty of the motor carrier to require observance" of the regulations involved.

49 U.S.C. §322(a) imposes fines for the knowing and wilful violation of any provisions of "this chapter, or any rule, regulation, requirement or order thereunder. . ."

49 C.F.R. 392.2 provides as follows:

> "Every motor vehicle must be operated in accordance with the laws, ordinances and regulations of the

> jurisdiction in which it is being operated, However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with."

The federal government's intent to preempt this field could hardly be more clear. An inconsistent state rule or order requiring an employer to employ as a truck driver in interstate commerce an individual who does not satisfy the federal regulations of the Department of Transportation would not only grossly violate the regulations above cited, but would subject the employer to federal fines and possible civil liability.

The United States Supreme Court held in *Morris v. McComb,* 332 U.S. 422, 68 S. Ct. 131, 92 L. Ed. 44 (1947), that even a driver who spends as little as 4% of his work time engaged in interstate commerce is subject to the Act and regulations thereunder.

Appellant apparently does not dispute the fact that if his driving for Frito-Lay took him across state lines, he would be engaged in interstate commerce and subject to the regulations of the Department of Transportation. He contends, rather, that his employer should have formulated a special run for him so that he could avoid crossing state lines, his claim being that he would then no longer be engaged in interstate commerce within the meaning of the Act and hence not subject to the D.O.T. regulations. Even assuming, arguendo, that Frito-Lay could be forced to create a special job for Mr. Lyons involving only Wisconsin runs, he would still be subject to D.O.T. regulations and consequently, inelligible because of his deficient vision. As stated by the lower court,

> "Even if Frito-Lay created a "run" for Lyons that did not take him outside Wisconsin, he would be deliverying

goods that are in the stream of interstate commerce." (Memorandum Decision, p. 5.).

The facts indicate that virtually every truck that leaves the Beloit plant, irrespective of its destination, contains products manufactured in, and shipped into Beloit from, other states. The drivers who deliver these products from the Beloit terminal to their ultimate destinations. . . .

* * *

exceed those present when the driver is behind the wheel of a private passenger car.

Similarly, Respondent's Exhibit 32, containing the American Medical Association's standards with respect to vision and driving provide that a driver such as Mr. Lyons should have central acuity of at least 20/40 in one eye and no worse than 20/60 in the other. Their classification of drivers depending on the kind of driving they do is also in recognition of the fact that commercial driving, such as that involved herein, is subject to special hazards not present in ordinary automobile operation.

The fact that Mr. Lyons has had only one accident during the time he was working for Frito-Lay is immaterial. Obviously, an employer need not await a catastrophe before taking precautionary measures to protect against such an occurrence.

In the face of such evidence as justification for the federal regulations, certainly Frito-Lay cannot be required to ignore the federal regulations, clearly adopted with a view toward public safety, and then face possible fines, penalties and civil liability as a consequence.

B. The Route Changes Proposed by Appellant Would Not Exempt Him From the D.O.T. Regulations.

As discussed previously in this brief and as held by the lower court, even if Lyons could be restricted to deliveries which did not require him to cross state lines, he would still be driving in interstate commerce, and so subject to the D.O.T. regulations, because the products he would be delivering would be interstate commerce.

In order for Lyons to drive a truly intrastate route, it would be necessary not only that he drive completely within the State of Wisconsin, but also that he deliver only products that were manufactured at the Beloit plant. This possibility has never been an issue and no testimony was taken concerning that at the time of the hearing nor was the possibility raised by the Appellant below. Clearly, however, this would require a drastic revision in the traffic operations of Frito-Lay, as pointed out in its letter to Mr. Lyons of January 22, 1976 (Ex. 17). The Beloit plant did not manufacture a complete line of Frito-Lay products. In order to supply a complete line to retailers, the products were brought in from other states. Only in very rare instances would a truck leave the Beloit terminal which did not contain both Beloit and out of state products (Tr. 133). It would obviously be impractical for Lyons to be allowed to deliver only Beloit products within Wisconsin, since other truck drivers would then have to deliver the out of state products to the same retailers, thereby duplicating a portion of Lyons' hypothetical run in order to supply the retailers with a full line of Frito-Lay products.

It is submitted that the proposed accommodation by the creation of a special Wisconsin run that would not involve interstate commerce is unworkable, impractical and certainly not required of the Respondent. The Wisconsin run proposed by the Appellant, which would involve the delivery of both Beloit and out of state products, would not solve the problem of the D.O.T. regulations.

C. There is No Issue in This Case Concerning the "Spotter" Position.

Appellant contends for the first time on this appeal that Frito-Lay should have offered to Mr. Lyons the spotter position at the Beloit terminal. No such argument was made in the lower court and none was made before the Commission. The only testimony at the time of the hearing concerning the spotter position was that there was such as position and that the job was not offered to Mr. Lyons (Tr. 30, 76). There was no evidence that such a job was available at any material time, what the specific job duties for the spotter position were, what the rate of compensation was, or whether Mr. Lyons would have been interested in such a job had one been available.

It is submitted that the question of the spotter position is a red herring on this appeal. The Appellant should not be permitted to raise this issue for the first time on appeal, especially when there is no evidentiary basis upon which the issue, even if it were properly presented could be decided. *Schneider Fuel & Supply Co. v. West Allis State Bank,* 70 Wis. 2d 1041, 236 N.W. 2d 266.

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 79-238

FRITO-LAY, INC.,

Petitioner-Respondent-Petitioner,

v.

WISCONSIN LABOR and INDUSTRY REVIEW COMMISSION,

Respondent,

JAMES LYONS,

Appellant.

Appeal from a Decision of the Court of Appeals, District IV

BRIEF OF PETITIONER-RESPONDENT-PETITIONER

*****

been added to the period. The notice of appeal, filed February 15, 1979, was two days late.

The failure to timely file the notice of appeal deprived the Court of Appeals of subject matter jurisdiction. Such objection is not subject to waiver and can be raised at any time. *Fredrick v. Janesville,* 91 Wis. 2d 572, 577, 283 N.W.2d 480 (1979); *First Wisconsin National Bank of Madison v. Nicholaou,* 87 Wis.2d 360, 364, 274 N.W.2d 704 (1979).

II. THE COURT OF APPEALS ERRONEOUSLY IMPOSED UPON FRITO-LAY A DUTY TO ACCOMMODATE THE HANDICAP OF ITS EMPLOYEE

Article 49 U.S.C., sec. 304 empowers the Interstate Commerce Commission to regulate common carriers and contract carriers and establish for private carriers of property by motor vehicle, "reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees. . ." Those duties have now been transferred to the Department of Transportation. Pub. L. 89-670, Oct. 15, 1966, 80 Stats. 931. 49 U.S.C., sec. 302(a) provides that the provisions of the chapter apply to the transportation of passengers or property in interstate commerce and vests the responsibility for regulating such transportation in the Interstate Commerce Commission (now D.O.T.). 49 U.S.C., sec. 303 (10) defines "interstate commerce" as:

> "commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express or water. . ."

Pursuant to its authority under 49 U.S.C., sec. 304, the Federal Highway Administration has by regulation established minimum physical requirements for drivers subject to the Act, contained in 49 C.F.R., Transportation. Section 391.41(10) specifically provides that a person shall not drive a motor vehicle unless he has:

> "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective

lenses, distant binocular acuity of at least 20/40 Snellen in both eyes with or without correcrive lenses

Section 390.32 of the F.H.A. regulations specifically provides that "it shall be the duty of the motor carrier to require observance" of the regulations involved.

49 U.S.C., sec. 322(a) imposes fines for the knowing and wilful violation of any provisions of "this chapter, or any rule, regulation, requirement or order thereunder. . ."

49 C.F.R., Sec. 392.2 provides as follows:

> "Every motor vehicle must be operated in accordance with the laws, ordinances and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Highway Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Highway Administration regulation must be complied with."

The federal government's intent to preempt the field could hardly be more clear. An inconsistent state rule or order requiring an employer to employ as a truck driver in interstate commerce an individual who does not satisfy the federal regulations of the Department of Transportation would not only violate the regulations above cited, but would subject the employer to federal fines and possible civil liability.

The United States Supreme Court held in *Morris v. McComb,* 332 U.S. 422 (1947), that even a driver who spends as little as 4% of his work time engaged in interstate commerce is subject to the Act and regulations thereunder.

The Court of Appeals concluded that drivers for Frito-Lay who cross state lines in the course of making deliveries are engaged in interstate commerce and hence subject to the stricter federal requirements. However, it also concluded that drivers who make deliveries solely within the state of

Wisconsin, even though they are delivering products shipped from out-of-state, are not engaged in interstate commerce and hence not subject to the federal vision requirements.

Putting aside, for the moment, the question of whether runs which do not cross state lines are in interstate commerce, the fact remains that Lyons' job, at the time of his discharge, did require him to cross state lines and so, even under the narrow view of interstate commerce taken by the Court of Appeals, Mr. Lyons could not perform his job duties without violating federal law.

Mr. Lyons was discharged at the end of October

* * * * *

Motion to Dismiss or Affirm

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-229

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRITO-LAY, INC.,

Appellant,

vs.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION and JAMES R. LYONS,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

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ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee James R. Lyons moves that this appeal be dismissed on the ground that this Court does not have jurisdiction thereof. Appellee alternatively moves that the judgment below be affirmed because the questions raised are so insubstantial as not to require further argument.

OPINIONS BELOW

This is an appeal from a decision of the Supreme Court of Wisconsin affirming without opinion the decision of the Wisconsin Court of Appeals, which concluded that Appellant Frito-Lay had discriminated against Appellee James Lyons in violation of the Wisconsin Fair Employment Act, and was not exempt from application of that statute by reason of federal regulations to which he allegedly was subject. The text of these opinions and the lower judicial and administrative opinions rendered in this case are set forth in the appendix to Appellant's Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in Appellant's Jurisdictional Statement, but the application of those requisites to the instant appeal will be argued below.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Pertinent constitutional, statutory and regulatory provisions are set forth in the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Prior to his discharge in January, 1976, James Lyons had worked as a semi-trailer truck driver for almost twenty years, including almost five years with Frito-Lay, Inc. in Beloit, Wisconsin, without a single reportable accident. Lyons, who since birth has suffered from amblyopia or "lazy eye" in his left eye, and has 20/20 vision in his right eye, nevertheless had passed the requisite sight examination for and had held a regular Wisconsin driver's license and also a chauffeur's license for over twenty years. (App. 4.)

At Frito-Lay his duties included deliveries both to points within Wisconsin and to points outside of the state from the Beloit plant. Lyons and his coworkers delivered products manufactured at the plant, which had been commingled with products shipped to Beloit from other plants. (App. 5.) These deliveries were made pursuant to orders received and filled at the Beloit plant. (App. 6, 12.)

Packages from other plants were unloaded at the Beloit plant and then individually marked for their destinations. Less than 10% of the deliveries originating at Beloit were scheduled directly to their ultimate destinations from points outside of the state. (App. 6.) About 38% of the total products delivered from the Beloit plant were trans-

ported to points within Wisconsin. (App. 5.) There were numerous delivery runs wholly within the state every day. (App. 9, 13.)

Lyons was suspended in October, 1975, pending a status check concerning his eye condition. (App. 4.) During his suspension Frito-Lay wrote to the Department of Transportation (hereinafter DOT), inquiring about vision requirements for drivers in interstate commerce under 49 C.F.R. sec. 391. The DOT responded that although no waiver of its strict vision requirements would be granted for drivers in interstate commerce, "[d]rivers may drive a commercial motor vehicle in intrastate commerce, subject to State minimum, if any, and in operations conducted wholly within a municipality or commercial zone, if hazardous materials are not being transported . . ." (Supp. App. 106). Also during his suspension examinations by two ophthalmologists indicated that he had compensated completely for his eye condition and would continue to be fully capable of driving a truck safely. (App. 4; Supp. App. 101, 102.)

Nevertheless, Frito-Lay terminated Lyons' employment. The letter of termination dated January 22, 1976, noted that DOT regulations prevented Lyons from driving in interstate commerce. Implicitly recognizing that DOT regulations did not apply to runs wholly within the state, the notice further stated that "present methods of traffic center operation, the current labor contract, and the future distribution plans prohibit us from providing you with only intrastate runs". (Supp. App. 107.)

The Wisconsin Labor and Industry Review Commission and Wisconsin courts have found that Lyons would have been able to select all intrastate runs under the bidding system by which drivers assigned themselves to routes. Under the new bidding system adopted shortly after the termination of his employment drivers chose their runs on a daily basis, making it even more certain that Lyons could have obtained only in-state runs. Furthermore, the nine drivers senior to Lyons offered to leave intrastate runs open to him in the future. (App. 14, 26.) Finally, the drivers agreed to give Lyons the "spotter" position, which involved movements wholly within the yard of the plant, when it became available. (App. 14, 26.) The company refused to permit Lyons to avail himself of any of these possibilities.

Over five years ago, on February 4, 1976, Lyons filed a complaint against Frito-Lay with the Wisconsin Department of Industry, Labor and Human Relations, Equal Rights Division, alleging that Frito-Lay had discriminated against him because of a handicap, in violation of the Wisconsin Fair Employment Act, WIS. STAT. secs. 111.31-37. The Department held a hearing at which both Lyons and Frito-Lay were permitted a full and fair opportunity to present all facts which might support their respective positions. Based on the evidence presented at this hearing the Department recommended that findings and an order be entered for Lyons and against Frito-Lay. (App. 27-28.) Thereafter the Labor and Industry Review Commission adopted the Department's proposed findings in an Order issued October 14, 1977. (App. 22.) The Commission concluded that Frito-Lay had discriminated

against Lyons on the basis of his handicap and ordered the employer to reinstate him with backpay and to allow him to bid for intrastate runs and the "spotter" position. (App. 27-28.)

Frito-Lay appealed to the Dane County Circuit Court. The Circuit Court summarily reversed the Commission and set aside its findings and Order, adopting Frito-Lay's theory that because a substantial part of Frito-Lay's operations were in interstate commerce, all its drivers therefore were engaged in interstate commerce and subject to DOT regulations. (App. 15-19.) The Court failed to address Frito-Lay's failure to offer Lyons the "spotter" position, involving movements wholly within the yard of the plant, and did not mention the other drivers' offers to accommodate him. The Court also failed even to note the controlling Seventh Circuit Court of Appeals decision which directly contradicts the theory advanced by the Circuit Judge. *Goldberg v. Faber Industries, Inc.*, 291 F.2d 232 (7th Cir. 1961).

Lyons appealed to the Wisconsin Court of Appeals, which reversed the Circuit Court ruling and reinstated the Commission's Order. (App. 14.) The Court of Appeals relied on and followed the Seventh Circuit Court of Appeals decision in the *Goldberg* case, *supra*, which established that if a carrier operates in interstate and intrastate commerce, but certain of its drivers handle only intrastate traffic, then the Interstate Commerce Commission does not have the power to establish qualifications as to those drivers. *Id.* at 235. On the basis of this controlling interpretation of federal law, the Wisconsin Court of Appeals agreed

with the Commission that DOT regulations were not applicable to drivers on intrastate runs, and that Frito-Lay had failed to prove as a matter of fact that its discriminatory treatment of Lyons was exempt under the Wisconsin Fair Employment Act or otherwise.

The Wisconsin Supreme Court heard Frito-Lay's appeal and affirmed the Court of Appeals decision, by a divided court, without opinion, on March 31, 1981.[1] On April 20, 1981, the last possible day for such a motion, Frito-Lay filed with the Wisconsin Supreme Court a motion for reconsideration, which motion was denied on May 4, 1981. This final order of the Wisconsin Supreme Court required Frito-Lay to allow Lyons, with the voluntary cooperation of his co-workers, to participate in the bidding system and choose from among the many available delivery runs wholly within the State of Wisconsin.

One hundred thirteen (113) days after the Wisconsin Supreme Court had issued its decision in this case Frito-Lay filed a Notice of Appeal to this Court, on July 22, 1981, and subsequently a Jurisdictional Statement on August 3, 1981. It is in this Statement

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1. The two issues argued most vigorously by Frito-Lay before the Supreme Court were whether or not the Wisconsin Fair Employment Act required any reasonable accommodation in handicap discrimination cases and whether or not Lyon's appeal to the Court of Appeals had been timely. This latter issue was the only one that the Court specifically had directed the parties to address when it accepted Frito-Lay's appeal. In issuing its decision without opinion the Supreme Court chose not to reveal which issue or issues had divided the Court.

that Frito-Lay for the first time argues that the application of Wisconsin's Fair Employment Act to it in this instance imposes an "undue burden" on interstate commerce, in violation of the United States Constitution. James Lyons now files this motion to dismiss the appeal or, in the alternative, affirm the judgment of the Wisconsin Supreme Court.

ARGUMENT

I. *APPELLANT'S APPEAL SHOULD BE DISMISSED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR IT.*

Frito-Lay presents two questions on this appeal. The first question, regarding the alleged inconsistency between the application of Wisconsin's handicap discrimination statute and federal vision requirements, would be reviewable, if at all, only by writ of certiorari and not by appeal under 28 U.S.C. sec. 1257(2). Indeed, this Court has no jurisdiction at all because the judgment of the Wisconsin Court rests on adequate and independent state grounds. This Court has no jurisdiction to decide the second question concerning the alleged unconstitutional burden on interstate commerce because it is raised for the first time on this appeal.

Frito-Lay, by the terms of the first question presented, purports to draw into question the validity of a state statute as applied to it, thus invoking the provisions for an appeal by right under 28 U.S.C. sec. 1257(2). But Frito-Lay's misleading statement should not be allowed

to obscure the actual nature of the question presented throughout this lengthy litigation. Frito-Lay never has attempted to argue that the state may not forbid it to discriminate on the basis of handicap, as the state statute in question here does.

On the contrary, before finding it advantageous to tailor its claim to the language of 28 U.S.C. sec. 1257(2), Frito-Lay argued merely that its actions were exempt by reason of the terms of the state statute itself, which exclude from the definition of discrimination a termination based on inability to perform job duties. WIS. STAT. sec. 111.32(5)(f). The Commission having found that Frito-Lay discriminated against Lyons, Frito-Lay attempted to satisfy the burden of showing that its actions were exempt under the Wisconsin Fair Employment Act or otherwise. (App. 6.) This is the context in which the Wisconsin courts reviewed Frito-Lay's federal claim.

The state courts did not uphold the validity of the state statute because its validity was not questioned. Where the validity of a statute is not squarely challenged, the statute is "too tangentially involved to satisfy 28 U.S.C. sec. 1257(2)". *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967). See also *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-187 (1945).

In the cases cited by Frito-Lay in support of its right to appeal the appellants had alleged that the statute was invalid as applied to them and others similarly situated. It was alleged that the state could not tax them, see, e.g., *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 686 (1965); *Central Grey-*

hound Lines, Inc. v. Mealey, 334 U.S. 653, 654 (1948); or prohibit the form of expression engaged in, see, e.g., *Cohen v. California*, 403 U.S. 15, 17-18 (1971); or prescribe the manner in which the plaintiff did its business, see e.g., *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 287 (1921), because of an alleged repugnance of such action by the state to the federal constitution, treaties or statutes. In this instant case, however, the validity of the Wisconsin Fair Employment Act, WIS. STAT. secs. 111.31-37, never has been in question.

Notwithstanding Frito-Lay's deceptive presentation of the first question, the only issue on this appeal is whether Frito-Lay satisfied the evidential burden of proving that, in fact, its action was exempt from the application of a valid state statute. Applying federal law, as interpreted by federal courts and agencies, to the facts of this case, the State Court of Appeals concluded that Frito-Lay had failed to present the evidence necessary to support its defense.

Appeal by right of a state court decision will lie only in a narrow class of important cases in which the very validity of state and federal statutes, on their face or as applied, is drawn into question. Frito-Lay cannot invoke the narrow jurisdiction of this court under 28 U.S.C. sec. 1257(2) by an artful rephrasing of its consistent line of argument throughout over five years of litigation before the administrative bodies and courts of Wisconsin.

If this Court has jurisdiction over this case at all, it would be only by certiorari under 28 U.S.C. sec. 1257(3). Frito-Lay must show that there are "special and important reasons" for this Court in its sound discretion to

grant certiorari. See, e.g., *Fay v. Noia*, 372 U.S. 391, 436 (1963). All further argument as to why this appeal should be dismissed or, in the alternative, why the state courts' judgment below should be affirmed also should be taken as reasons why a writ of certiorari should not be granted.

Whether review by appeal or by certiorari otherwise would be appropriate, it cannot be had at all where, as here, the judgment of the state court rests on adequate and independent state grounds. Although much argument has been devoted here to the federal question of the nature of the in-state runs, Frito-Lay's failure to offer Lyons the "spotter" position was also grounds for the finding of discrimination on the basis of a handicap. No federal defense that has been or could be offered would excuse Frito-Lay's refusal to offer Lyons this option. Therefore, a reversal based on the federal issue of the nature of Frito-Lay's in-state delivery runs would not require a reversal of the state court's judgment, under state law, that Frito-Lay had discriminated against Lyons. Under such circumstances this Court's determination of the federal question would constitute an advisory opinion, and run contrary to well-established jurisdictional principles. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1954).

The second question presented is raised for the first time on this appeal. At no time during the long course of litigation before the Wisconsin administrative tribunals and courts did Frito-Lay challenge the Wisconsin handicap discrimination statute as an unconstitutional burden on interstate commerce in violation of the Commerce

Clause. This Court recently reaffirmed its steadfast refusal to hear such claims:

> It was very early established that this Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randel*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789 . . . vested this court with no jurisdiction unless a federal question was raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The rationale for this jurisdictional hurdle is equally clearly established and applies with full force to the instant case. Frito-Lay now asserts for the first time that, "[e]ven if the Wisconsin courts were correct in deciding that Frito-Lay's deliveries within Wisconsin were not in interstate commerce . . . [their ruling] is an undue burden on interstate commerce and must not escape review" (Jurisdictional Statement at 18-19). Yet the Wisconsin courts had no opportunity to consider this objection to the state statute, and perhaps to construe it to avoid a constitutional challenge. Furthermore, the record was not assembled with an eye to this challenge and it provides an utterly inadequate evidentiary basis for this Court to decide whether or not the Wisconsin Fair Employment Act creates an undue burden on interstate commerce.

Frito-Lay's appeal should be dismissed for lack of jurisdiction for the following reasons: the first question presented, which in any event would be reviewable only by certiorari, is indeed not reviewable at all because the judgment of the state courts rests on adequate and in-

dependent state grounds; the second question is not reviewable because it is presented for the first time on appeal to this Court.

II. *THE JUDGMENT BELOW SHOULD BE AFFIRMED OR, IN THE ALTERNATIVE, A WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE QUESTIONS PRESENTED ARE NOT SO SUBSTANTIAL AS TO REQUIRE FURTHER ARGUMENT.*

A. *The judgment of the Wisconsin courts was clearly correct.*

The decision of the Wisconsin Court of Appeals, which was affirmed by the state Supreme Court, properly distinguished two aspects of the question whether Lyons must be required to meet the federal vision requirements established pursuant to the Motor Carriers Act, 49 U.S.C. sec. 304(a)(3): first, "whether Frito-Lay showed that all of its truck movements from Beloit are in interstate commerce, as defined by the Motor Carriers Act" (App. 8); and, second, "whether Frito-Lay has shown that all its drivers must comply with DOT physical qualifications because Frito-Lay has interstate truck runs, even if it also has intrastate runs". (App. 13.) Although Frito-Lay has confounded these issues in its Jurisdictional Statement, it is appropriate to follow the analysis of the Wisconsin Court of Appeals.

The Court of Appeals, given the evidence of record, found that not all of Frito-Lay's runs were in interstate commerce. In so doing the Court properly rejected

Frito-Lay's reliance on *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943), because that case did not involve the Motor Carriers Act, but rather the Fair Labor Standards Act. The Court pointed out that, "[t]here is no single concept of interstate commerce which can be applied to every federal statute regulating commerce". *McLeod v. Threlkeld*, 319 U.S. 491, 495 (1943). Indeed, this Court established in *Morris v. McComb*, 332 U.S. 422 (1947), cited by Frito-Lay, that the definition of interstate commerce for the purposes of the Motor Carrier Act is not merely different, but is narrower than the definition of interstate commerce applied under the Fair Labor Standards Act. *Id.* at 423-424.

Frito-Lay has chosen not even to mention those cases in which the courts have adopted and applied the Interstate Commerce Commission's own criteria for whether a given route, subsequent to transportation in interstate commerce, is nevertheless intrastate commerce within the meaning of the Motor Carriers Act. *Baird v. Wagoner Transportation Co.*, 425 F.2d 407, 411 (6th Cir. 1970), adopted and explained the ICC criteria established in *Ex Parte No. MC-48*, 71 M.C.C. 17, 29. The Wisconsin Court of Appeals applied those criteria to the facts of this case and determined that Frito-Lay had not established that all its truck runs from Beloit to points exclusively in Wisconsin were in interstate commerce. (App. 11.)

There was, simply stated, a failure of proof. Now Frito-Lay is asking this Court to second guess the Wisconsin courts' evaluation of the evidence on this point.

It is doing so without even dealing squarely with the federal criteria outlined in *Baird*, *supra*, citing instead

Beggs v. Kroger Co., 167 F.2d 700 (8th Cir. 1948), and *Shew v. Southland Corp.*, 370 F.2d 376 (5th Cir. 1966), cases which the Wisconsin court readily had distinguished on the basis of the federal criteria. Both failed to meet the *Baird* criteria. (App. 12-13.)

Frito-Lay would have this Court either second-guess the state courts' determination of the adequacy of the evidence, or overturn *Baird*, *supra*. But it could make neither demand with a straight face, and thus has chosen to phrase its appeal in extremely vague terms based on general statements about the meaning and scope of interstate commerce. This Court cannot be expected to crowd an already overburdened docket with such frivolous appeals.

The second issue determined by the Wisconsin Court of Appeals was that if some drivers were engaged only in intrastate commerce, as defined by the *Baird* criteria, those drivers were not subject to the DOT requirements. In this the Court of Appeals relied on the controlling Seventh Circuit Court of Appeals decision which held that if a carrier operates in interstate and intrastate commerce, but certain of its drivers handle only intrastate traffic, then the Interstate Commerce Commission does not have the power to establish qualifications for those drivers. *Goldberg v. Faber Industries, Inc.*, 291 F.2d 232, 235 (7th Cir. 1961). This decision was in accord with the ICC's own interpretation of the scope of its jurisdiction. *Id.* Frito-Lay once again chooses to ignore this federal interpretation of federal law, which was controlling on the Wisconsin courts, rather than even attempt to distinguish it. Instead, Frito-Lay asserts the applicability of *Morris v. McComb*, *supra*, which *Gold-*

berg distinguished on precisely the grounds argued here, failing even to bring the *Goldberg* decision to the attention of this Supreme Court.

In *Morris* the holding was expressly limited to situations in which interstate routes were assigned indiscriminately to all drivers. But in the instant case, as in *Goldberg, supra*, some drivers never would be required to make interstate runs. The Commission found, and the Court of Appeals stressed, that intrastate runs were available (App. 13), and that "Frito-Lay does not assign drivers to truck runs. The drivers assign themselves through seniority bidding and those senior to complainant have agreed to give him intrastate runs" (App. 14). Frito-Lay has failed even to cite the cases which it necessarily must challenge, either directly or by distinguishing them, in order to undermine the Wisconsin decision. Instead, it chooses to make a backhanded attempt to retry the case and to challenge the factual determinations on which the Court of Appeals based its decision. In light of its astonishing failure to come to grips with the basis of the Wisconsin Court of Appeals decision, Frito-Lay's appeal must fail, and the judgment below should be affirmed without further argument.

B. *The judgment of the Wisconsin courts imposes no additional burden on Frito-Lay.*

In its argument that the Wisconsin courts have imposed an unconstitutional burden on interstate commerce Frito-Lay claims that the Wisconsin courts have ordered it to create a special route for Lyons, and "to restructure itself to perform its operations in a manner

that will create an activity subject to state regulation" (Jurisdictional Statement at 19). As the constitutional question noted was not timely raised, this extraordinary distortion can bear only upon the substantiality of the federal question presented.

The Wisconsin Court of Appeals decision was based expressly on findings that James Lyons, through the seniority bidding system and with the willing cooperation of his fellow workers, could assign himself to intrastate runs only. The Order of the Commission, which the Court of Appeals affirmed, ordered Frito-Lay to reinstate Lyons with seniority and backpay and to "allow Complainant to bid for intrastate runs and the spotter position, according to the agreement of the truck drivers who were senior to him prior to his termination" (App. 27-28). Indeed, Lyons may not need the generous cooperation that his coworkers have offered him, particularly after five years of litigation and, therefore, the accrual of additional seniority. In any event, Frito-Lay would not be required to make any accommodation whatsoever except to allow Lyons to participate in the current bidding system.

There is some question as to whether Wisconsin's handicap discrimination statute even requires "reasonable accommodation" by the employer to the needs of a handicapped employee. See *American Motors Corp. v. Industry, Labor and Human Relations Dept.*, 93 Wis.2d 14, 22-23, 286 N.W.2d 847 (1979) (no clear duty to accommodate the religious needs of the employee). Frito-Lay, however, seems to attempt to challenge the very concept of reasonable accommodation as an undue burden on interstate commerce. If that is the aim of this

otherwise difficult to understand appeal, Frito-Lay has chosen a uniquely inappropriate record on which to pursue that aim. No evidence of any burden on commerce was assembled, except the "evidence" blithely inserted by Frito-Lay in its Jurisdictional Statement filed with this Court. Indeed, no accommodation whatsoever, reasonable or otherwise, was required in the instant case. The abstract merits of imposing a duty reasonably to accommodate handicapped employees will have to await another day in court, for the judgment of the Wisconsin courts in this case does not impose such a duty. That judgment should be affirmed.

C. *The judgment of the Wisconsin courts does not raise the spectre of inconsistent interpretations of federal law.*

State courts must confront the intricacies of federal regulation when a federal defense such as Frito-Lay's is offered as against the application of a state statute. The Wisconsin Court of Appeals closely followed the interpretations of this Court, federal circuit courts of appeal and federal agencies, of the federal law it was compelled to apply to the facts of this case. In these judicial and regulatory decisions there exists an intricate yet coherent and consistent body of federal law to which state courts now may refer. A reversal of the Wisconsin courts would undermine the validity of their careful adherence to federal interpretation of federal law and would deprive state courts, in future cases, of the guidance of the federal agencies entrusted with the administration of federal law. A reversal of this judgment would indeed increase the "substantial risk of inconsistent adjudications" (Jurisdictional Statement at 17) which Frito-Lay bemoans.

If Frito-Lay feels itself confused and adrift as a result of the Wisconsin judgment, as seems clear from its Jurisdictional Statement, it may be reassuring to examine the solid body of federal law to which the Wisconsin Court of Appeals referred; in particular, Frito-Lay would rest easier if it had read the two United States Circuit Court of Appeals decisions which provide unambiguous support for the state courts' decision in favor of Lyons. *Baird v. Wagoner Transportation Co., supra*; *Goldberg v. Faber Industries, supra.* Disturbing the well-reasoned judgment of the Wisconsin courts in this case would only increase the risk of inconsistent interpretations of federal law by state courts.

D. *The judgment of the Wisconsin courts is supported by considerations of both policy and equity.*

Reversal of the Wisconsin judgment, as Frito-Lay urges, would strip the states of the power to regulate any aspect of a business, any portion of which is engaged in interstate commerce and subject to federal regulation. Congress may or may not have the power to preempt state regulation to this extent under the Commerce Clause. But this Court should not extend the reach of federal regulatory jurisdiction beyond that which Congress has granted federal agencies. It is particularly important not to infringe upon the power of the states to enact appropriate legislation at a time when the federal government is attempting to reduce its involvement in the day-to-day activities of the people.

Wisconsin, like many states, has chosen to prohibit employment discrimination on the basis of handicap. Frito-Lay discriminated against James Lyons because of

his handicap, and failed to present the evidence necessary to establish that it was exempt under the provisions of the statute itself because it was subject to conflicting federal regulations. Five years of litigation have passed since Lyons was deprived of his livelihood by Frito-Lay's discriminatory treatment. Yet Frito-Lay persists in placing expensive and time-consuming hurdles between Lyons and the relief to which he is entitled, now by taking a frivolous appeal to this Supreme Court in which it does not even note the controlling cases relied on by the Wisconsin Court of Appeals in reaching the judgment subsequently affirmed by the Wisconsin Supreme Court. This Court should put an end to Frito-Lay's delaying tactics.

For all the foregoing reasons James Lyons asks that this Court grant his motion to dismiss this appeal for lack of jurisdiction or, in the alternative, affirm the judgment of the court below because the federal questions raised by the appeal are so insubstantial as not to require further argument. For the same reasons, a writ of certiorari should not be granted because Frito-Lay has failed to show special and important reasons for granting the writ.

Respectfully Submitted,

LAWTON & CATES

Bruce F. Ehlke
110 East Main Street
Madison, Wisconsin 53703
(608) 256-9031

Attorney For James Lyons

SUPPLEMENTAL APPENDIX

JOHN F. PEMBER, M. D.
908 WEST MILWAUKEE STREET
JANESVILLE, WISCONSIN 53545

November 3, 1975

OPHTHALMOLOGY

Gene DeRosio
Frito-Lay
Box 357
Beloit, Wis.

Re: James Lyons

Mr. Lyons was seen today for evaluation of his eyes.

He gave a history of wearing a patch over his right eye at age 5 or 6 for a "lazy eye". In spite of this, he was accepted by the Army and served. He has been driving for over twenty years with an excellent record.

The examination revealed uncorrected vision of Rt. 20/20 J1
Lt. 20/200 J8.
There were no abnormalities of the cornea, lens, deeper parts of the eye.

The right eye shows a minimal hyperopia (far-sightedness), the left eye a much higher amount. This cannot be corrected by conventional or contact lens beyond the 20/200 level.

His color vision and peripheral vision are normal.

Diagnosis: Refractive amblyopia ("lazy eye"), congenital.

In view of the lack of problems attributable to his eye condition in both the Army and subsequent driving, I feel Mr. Lyons should be considered for a waiver so he may drive wherever he has to.

Sincerely yours,

John F. Pember, M. D.

JFP:rc
Enc.

Complainant's Exhibit 14

CARDIO-VASCULAR, THORACIC & GENERAL SURGERY
PEDIATRIC SURGERY
ORTHOPEDIC SURGERY
INTERNAL MEDICINE
ALLERGY
CARDIOLOGY
ONCOLOGY - HEMATOLOGY
GASTROENTEROLOGY AND GASTROINTESTINAL ENDOSCOPY
OTORHINOLARYNGOLOGY & MAXILLOFACIAL SURGERY
UROLOGY
OBSTETRICS & GYNECOLOGY
PEDIATRICS & ADOLESCENT MEDICINE
PEDIATRIC HEMATOLOGY & ONCOLOGY
OPHTHALMOLOGY
NEUROSURGERY
NEUROLOGY-ELECTROENCEPHALOGRAPHY ELECTROMYOGRAPHY
RADIOLOGY
DERMATOLOGY
BUSINESS MANAGER
ASS'T BUSINESS MANAGER

DEAN CLINIC, S.C.
1313 FISH HATCHERY ROAD MADISON, WISCONSIN 53715
PHONE 252-8000

November 11, 1975

TO WHOM IT MAY CONCERN:

Re: Jim R. Lyons

Mr. Lyons has been examined in this office three times; in 1971, 1974, and most recently, 10/11/75.

He has best corrected vision of 20/200 in the left eye, compared to 20/20 with or without correction on the right. This condition has been present since childhood and is uncorrectable. He has amblyopia. His visual fields are normal, his color vision normal, and his stereopsis limited to 10%. He has been driving trucks for 20 years with this impediment with no problem, so it is obviously well compensated.

I strongly feel that he is a good candidate for a waiver of the interstate regulation, requiring 20/40 each eye, as long as his right eye remains correctable to 20/20.

Sincerely,

CNahn M.D.
Charles E. Nahn, M.D.

CEN/dw

Complainant's Exhibit 15

FRITO-LAY, INC.

To: Janes Lyons

Copies: File

From: Joe Rigoni

Date: Dec. 29, 1975

Subject: D.O.T. Decision

Here is the results of the D.O.T. final decision on your waiver.

Sorry it wasn't the other way. I am working on another deal for you.

Joe Rigoni

Complainant's Exhibit 16

APPENDIX
104

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
BUREAU OF MOTOR CARRIER SAFETY
WASHINGTON, D.C. 20590

DEC 1 1975

RECEIVED
DEC 12 1975
TRAFFIC

IN REPLY REFER TO:
HMC-22

Mr. Brent D. Werley
Fleet Safety Coordinator
Frito-Lay, Inc.
P.O. Box 357
Beloit, Wisconsin 53511

Dear Mr. Werley:

This is in response to your letter of November 20, requesting a waiver of the visual requirements prescribed in Section 391.41, Physical Qualifications for Drivers, of the Federal Motor Carrier Safety Regulations.

Please be aware that waivers are issued by this Federal Bureau only for loss of a foot, leg, hand, arm, or an impairment of their use, or other structural defect or limitations as set forth in Section 391.49(b)(1) and (2) of the Regulations. Waivers are not issued for visual disabilities which do not meet the minimum requirements.

Enclosed is our position paper on commercial vehicle driver visual requirements for your information and we thank you for your interest in the regulatory aspects of highway safety.

Sincerely yours,

M.T.M. Cadsawan DeLuciano, M.D.
Chief Medical Officer

Enclosure

U.S. PARTMENT OF TRANS ON
FEDERAL HIGHWAY ADMINIS ATION
BUREAU OF MOTOR CARRIER SAFETY
WASHINGTON, D.C. 20590

POSITION PAPER

COMMERCIAL VEHICLE DRIVER VISUAL REQUIREMENTS

Of the input required to drive, 90-95 percent originates through the sense of vision. The importance of vision to highway safety was officially recognized, when in 1937, the first Federal Motor Carrier Safety Regulations required adequate vision in both eyes. In 1952, the visual standards were strengthened to require visual acuity of not less than 20/40 in each eye, either without glasses or by correction. A revision of the regulations, effective January 1, 1971, included an additional requirement that a driver must also have distant binocular visual acuity of not less than 20/40 (Snellen) in both eyes, either with or without correction.

With respect to standards of visual acuity for commercial drivers the American Medical Association (AMA) has stated that a driver should have central visual acuity in both eyes. The AMA has recommended that a person who is sightless in one eye should not be issued a driver's permit.

The operation of a commercial motor vehicle presents strains and hazards that far exceed those present when the driver is behind the wheel of a private passenger car. Commercial motor vehicles are operated over long distances, at high speeds, in all types of weather. Their potential for involvement in accidents is far higher than that of lightweight vehicles which have less over-the-road exposure. Furthermore, because of their great size, the accidents in which commercial vehicles are involved are more likely to result in serious injury, deaths, and extensive property damage.

The Bureau is constantly reviewing the validity of its Regulations concerning the physical qualifications of drivers engaged in interstate or foreign commerce. To this extent, the Bureau has completed a recent research effort to reevaluate the current visual and auditory requirements for drivers to safely operate a commercial motor vehicle. The results of this study fail to support any relaxation of our present visual requirements.

There is no provision in the Motor Carrier Safety Regulations for a waiver of the minimum visual requirements or the issuance of a special

permit. Drivers may drive a commercial motor vehicle in intrastate commerce, subject to State minimum, if any, and in operations conducted wholly within a municipality or a commercial zone; if hazardous materials are not being transported as provided in Section 390.33 of the Motor Carrier Safety Regulations.

APPENDIX
107

FRITO-LAY, INC.

January 22, 1976

Mr. James Lyons

Dear Mr. Lyons:

Since the suspension of your driving assignments for Frito-Lay in November, your local management and our National Distribution staff have investigated your limitations in eyesight. A thorough review of transportation regulations and insurance liabilities has been conducted.

Our findings reveal that we are unable to obtain for you an exemption from the D.O.T. restrictions for your eyesight. That fact bars you from driving in interstate commerce. The present methods of traffic center operation, the current labor contract, and the future distribution plans prohibit us from providing you with only intrastate runs. These facts leave us no alternative but to terminate your services with Frito-Lay as a long haul driver.

We would like to thank you for your five years of exemplary service with Frito-Lay. Should you seek employment with an interstate carrier, we will readily furnish a favorable recommendation. We deeply regret that circumstances would not permit a different result.

Sincerely,

FRITO-LAY, INC.

W. J. Morgan,
Director of Traffic

WJM/lgc

FRITO-LAY TOWER • EXCHANGE PARK • P.O. BOX 35034 • DALLAS, TEXAS 75235 • (214) 357-1611

Complainant's Exhibit 17